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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

LOCAL 342, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), VAN E. WARREN, MARK BROCKETTE, GAIL M. TRIBBLE, LEWIS C. STONE, SHIRLEY L. JUDKINS, DELBERT STORIE, AND PERRY CARLTON,
Petitioners,

v.

TRW, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners,
v.
TRW, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision herein of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

(Figures in parentheses followed by the letter "a" refer to pages of Petitioners' Appendix.)

The opinion of the arbitrator (p. 1a *infra*) is reported as *Ross Gear Tennessee Plant*, at 45 Lab. Arb. 959. The opinion of the district court (p. 17a *infra*) has not been reported. The opinion of the court of appeals (p. 26a *infra*) is reported at 402 F. 2d 727.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1968. Its order denying rehearing was entered on November 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Where the labor arbitrator based his award on his interpretation of the collective bargaining agreement, could the court below properly deny enforcement on the ground that the agreement was clear and unambiguous and did not permit of interpretation by an arbitrator?

2. Where the labor arbitrator based his award on his interpretation of the collective bargaining agreement, could the court below properly deny enforcement on the ground that the arbitrator's interpretation added terms to the agreement?

STATUTE INVOLVED

The statute involved is Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185 (a).

STATEMENT OF THE CASE

The Strike and the Discharges

The collective bargaining agreement between respondent Company and petitioner Union included provisions for a five step grievance procedure and arbitration (p. 5a *infra*) and a broad no-strike clause, banning strikes during the

term of the agreement and giving the Company the right "to take disciplinary action, including discharge, against any employees who participate in [a strike], whether such action is taken against all of the participants or against only selected participants".[1]

When a two day wild cat strike occurred, the Company discharged the seven individual petitioners in telegrams grounding its action on the employees' "participation" in the strike (p. 27a *infra*). The Union processed grievances over the discharges through the five steps of the grievance procedure and to arbitration. At the arbitration hearing the Company revealed for the first time that the ground for the men's discharges was not merely participation in the strike, but active encouragement of others to strike (pp. 15a, 28a *infra*).

The Arbitrator's Award (p. 1a infra)

The arbitrator based his opinion and award on his interpretation of the selective discipline and grievance procedure provisions of the agreement.

As he read the selective discipline provision (note 1), it did not give the Company an absolutely free hand in disciplining employees who participated in a strike. While the Company did not have to discipline all employees guilty of the same conduct, but could discipline some and not others —the discipline given an employee had to be appropriate

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[1] "During the term of this agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike, picketing, slowdown or other curtailment or restricting of production or interference with work in or about the Company's plant or premises. . . . The parties recognize the right of the Company to take discliplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants. . . ." (p. 27a *infra*).

to the conduct for which he had been selected for discipline. For example, while discharge might be appropriate discipline for picket line violence, it might not be for mere participation in a strike. In a case of this type, the arbitrator concluded, he was required to rule on the appropriateness of the measure of discipline. He noted that the standard on the basis of which the Company had selected the seven employees for discipline—active encouragement of others to strike—was a proper one; and he ruled discharge an appropriate measure of discipline to be imposed for such conduct. He expressly declined to rule on whether discharge would be appropriate discipline for lesser forms of strike participation. He articulated the foregoing interpretations and rulings in the following passages of his opinion:

> "Under Article X, Section 1 the Company has power to impose selective discipline, that is, the disciplinary action, including discharge, which the Company is empowered to take need not be imposed upon all employees who are equally guilty of participating in a violation of the section. This provision for selective discipline does not, however, preclude an inquiry into the reasonableness of the particular penalty under all the circumstances even though that penalty need not be necessarily imposed upon all who are equally guilty.
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> * * * * *
>
> "The Arbitrator believes that under Article X, Section 1 the Company was entitled to utilize 'active encouragement of others to strike' as a standard for the selection of employees who were subject to discipline. It is not necessary to debate the extent to which the discharge penalty could be imposed upon certain forms of participation in a strike. In any event, it is clear that the discharge penalty under the terms of Article X, Section 1 could appropriately be used for those persons who were shown

> by a sufficiency of the evidence to have actively encouraged other employees to strike." (pp. 10a-11a *infra*).

While he found that five of the dischargees had actively encouraged others to strike (p. 13a *infra*), he did not find substantial evidence that the remaining two had (p. 14a *infra*). He ordered them reinstated with back pay (p. 1a *infra*).

Though he found the other five had actively encouraged others to strike, he found that, in withholding the real basis for the discharges until the arbitration hearing, the Company violated the grievance procedure provisions of the agreement and denied the dischargees and the Union fundamental fairness (p. 15a *infra*). He ordered the five men reinstated, but without back pay (pp. 1a, 15a *infra*).

His ruling as to the five was based on his interpretation of the grievance procedure provisions of the agreement. He read the five step procedure as obligating the Company to reveal in the procedure the real ground for disciplinary action and the evidence upon which it based its claims. The multi-step grievance procedure exists, he reasoned, so that the Union can investigate the Company's claims and evidence and acknowledge or dispute them through the various steps of the procedure. Absent such disclosures, settlement of a grievance is impossible and one of the procedure's primary purposes is frustrated. Moreover, without such disclosures, it is impossible for disciplined employees and their Union to prepare a defense, he concluded. The arbitrator expressed the foregoing interpretation and ruling as follows:

> "The record shows that the employer in this case did not advise any of the grievants or the Union as to the basis for discharging the grievants either prior to discharge or thereafter. The record makes

it clear that the Company did not advise the Union or any of its representatives or the employees with regard to any of the incidents allegedly showing active encouragement of the strike by the grievants. It is clear in the record that after reports were received from various representatives of Management allegedly indicating active encouragement there was no effort to check with the employee involved or with any other employee who might have information to discover such additional facts as might be available. Thus the ultimate penalty of discharge was imposed on the basis of written reports without any opportunity being given the affected employees to explain or answer or give any information that they might have with regard to the matter reported. In addition, the Company's notice of discharge which was given to the affected employees and to the Union made no reference to the real basis of the discharge. Apparently there was no indication to the employees or to the Union prior to the arbitration hearing that the Company had acted on the basis of the belief that the discharged employees had actively encouraged other employees to strike.

"The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to discharge an employee without informing him of the charges against him and without affording some opportunity for objective investigation.

"In any event, for the Company to withhold the real basis for discharge while a grievance is being processed *results in preventing the grievance machinery from carrying out its intended function.*" (pp. 15a-16a *infra;* emphasis added).

When the Company refused to honor the award, the Union and the dischargees filed the instant action for compliance in the Middle District of Tennessee.

The District Court's Decision (p. 17a infra)

The district court ordered enforcement. He upheld the arbitrator's interpretations of the selective discipline and grievance procedure provisions of the agreement, saying:

> "The Court is of the opinion that the arbitrator's ruling that the exercise of the power of selective discharge must be reasonable under the circumstances is a fair and logical inference from the agreement. Also, it is a reasonable inference that in the exercise of this power fair procedure must be adhered to. The requirements of a reasonable exercise of the selective discharge provision and the use of fair procedures in selective discharge provide a logical interpretation of the collective bargaining agreement. By finding that it was implicit in the collective bargaining agreement that the power of selective discharge does not allow either an arbitrary selective discharge or the use of unfair procedure in affecting such a discharge, the arbitrator acted well within his authority. He did not violate the essence of the agreement nor did he in any way manifest an infidelity to his obligation. The arbitrator does not exceed his authority when he finds substantive rights and duties which are implied though not expressed in the agreement." (pp. 21a-22a *infra*).

The Court of Appeals' Decision (p. 26a infra)

The Court of Appeals for the Sixth Circuit denied enforcement on the ground that the selective discharge provision was clear and unambiguous and did not require interpretation by an arbitrator. The court said:

> "We consider that the company's contract with the union, of which all the individuals were members, gave it a clear right to do what it did. The language of this contract was not ambiguous, nor did any of its terms require interpretation by the arbitrator or the courts." (p. 30a *infra*).

The court then set forth its reading of the selective discipline provision, which was as follows. The Company had the unqualified right to discharge or take any lesser action it pleased against an employee who "participated" in the strike, without regard to the nature of his participation. There was no obligation that the discipline be appropriate. The Company had no obligation to disclose anything more about the basis for discipline than that it was for "participation" in the strike. Moreover, since it was admitted that all seven employees had "participated" in the strike, the arbitrator could not interfere with the measure of discipline awarded.[2]

Although the court originally characterized the arbitrator's rulings as interpretations,[3] it concluded by saying

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[2] "Appellees did not dispute the facts that:

* * * * *

c) The dischargees all took part in the involved conduct which violated the contract.

"Under these circumstances, the company had the right:

a) To take disciplinary action—including discharge—against any employee who participated in the described conduct, and

b) Such action could be taken against all *or against only selected participants.*

"Nothing in the contract made the exercise of these rights subject to ultimate approval of an arbitrator or a court; neither was there a requirement of any preliminaries—prior notice or bilateral investigation." (p. 31a *infra*)

* * * * *

"The conduct which brought into being the company's right to discharge any employee was 'participation in an action in violation of Section 1, Article 10, of the company-union agreement.' All seven appellees were admittedly guilty of such a violation and were thereby subject to discharge without reference to whether they were or were not activists in promoting or encouraging others to join in an illegal strike." (p. 32a *infra*).

[3] "The language of this contract was not ambiguous, nor did any of its terms require interpretation by the arbitrator or the courts." (p. 30a, *infra*).

they were terms the arbitrator had added to the agreement:

> "The conduct of the arbitrator, thus approved by the District Judge, in reality constituted the addition of terms to a negotiated contract which was neither unclear nor incomplete." (p. 31a *infra*).

ARGUMENT

1. The court below's refusal to enforce the arbitrator's award on the ground that the agreement was clear and unambiguous and did not permit of interpretation by an arbitrator is in conflict with this Court's Enterprise decision and repudiates the body of labor arbitration law this Court fashioned in the Trilogy.

In *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, this Court reversed a court of appeals that had denied enforcement of an arbitrator's award because it did not agree with the arbitrator's interpretation of the collective bargaining agreement. This Court said:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration of collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." 363 U.S. at 596.
>
> * * * * *
>
> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have

> no business overruling him because their interpretation of the contract is different than his." Id. at 599.

In the instant case the court below denied enforcement on the ground that, since the collective bargaining agreement was clear and unambiguous and had only one possible meaning, it was not susceptible to "interpretation" by an arbitrator, and the arbitrator's award, based on his "interpretations", was not entitled to enforcement. The court said:

> "We consider that the company's contract with the union, of which all the individuals were members, gave it a clear right to do what it did. The language of this contract was not ambiguous, nor did any of its terms require interpretation by the arbitrator or the courts." (p. 30a *infra*).

It is perfectly evident that what the court did was precisely what this Court enjoined the lower courts from doing, in *Enterprise* and the other Trilogy cases:[4] it substituted its reading of the agreement for the arbitrator's. The arbitrator had interpreted the selective discipline and grievance procedure provisions of the agreement as requiring the Company, in the exercise of its right of selective discipline, to apply disciplinary measures that were appropriate to the strike activity for which the employees were being disciplined, and to disclose the nature of the activity which was the basis for discipline early in the grievance procedure (see pp. 3-5 *supra*). The court below read the agreement as giving the Company the unqualified right to apply any disciplinary measure it pleased to an employee who had participated in a strike, without regard to the nature of his participation; and concluded that the

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[4] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574.

Company, therefore, had no obligation to apply "appropriate" discipline, and no obligation to disclose anything more about the basis for discipline than that it was for "participation" in a strike (see p. 8 *supra*).

Of course, the court did not *say* that it disagreed with the arbitrator's decision and was substituting its own for his. Instead, it said that the agreement was so clear and unambiguous that it did not permit of an arbitrator's interpretation. The court implied that, rather than substituting its interpretation for the arbitrator's, it was announcing the agreement's one true meaning—a meaning which was obvious to all but a labor arbitrator.

We submit that an arbitration award cannot be denied enforcement on such a ground. Since the Trilogy, and before, we have known that very few, if any, labor contract provisions have but one true meaning—a meaning so obviously true that the provision simply is not susceptible to alternative interpretations.[5] In *Warrior & Gulf*, for example, the Court said of collective bargaining agreements:

> "The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: some provide objective criteria almost automatically

[5] If there are such provisions, they do not deal with the right of selective discharge, for cases involving that right are grist to the arbitrator's mill. E.g.: *Philips Industries, Inc.*, 45 Lab. Arb. 945 (1965); *Eljer Company, Brass Div.*, 34 Lab. Arb. 741 (1960); *Yardley Plastics Co.*, 36 Lab. Arb. 280 (1960); *Kaye-Tex Mfg. Co.*, 36 Lab. Arb. 660 (1960); *Ford Motor Co.*, 41 Lab. Arb. 609 (1963); *Pure & Co.*, 43 Lab. Arb. 182 (1964); *Warren Co.*, 39 Lab. Arb. 395 (1962).

> applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' Shulman, *supra*, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators." 363 U.S. at 580-81.

Of agreements such as these, how can it be said (as the court below said) that any other than their simplest provisions are susceptible to but one interpretation? And how can it be said (as the court below implied) that an agreement's one true meaning can be plain to a court, but not to an arbitrator, who would probably make the mistake of trying to "interpret" the agreement? Of labor arbitrators the Court said, in *Warrior & Gulf:*

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . .
>
> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 363 at 581-82.

For a court to reject an arbitrator's interpretation of a collective bargaining agreement on the ground that the agreement can have but one meaning is for the court to acknowledge that it is substituting its interpretation for the arbitrator's, in violation of *Enterprise*.

So that other courts will not adopt this ground for denying enforcement, we ask the Court to review and reject it.

2. The court below's refusal to enforce the arbitrator's award on the ground that the agreement was clear and unambiguous and did not permit of interpretation by an arbitrator is in conflict with the Third Circuit's decision in Ludwig Honold Mfg. Co.

In *Ludwig Honold Mfg. Co. v. Fletcher* (p. 37a *infra*; not yet officially reported), the collective bargaining agreement provided that an employee newly assigned to a job could not be eligible for another job for six months. A contest for a new job developed between two men, each of whom had just been newly assigned to his present job. When the company assigned the job to the man who had less seniority, the union appealed the case to an arbitrator, who upset the company's assignment and ordered the job assigned to the employee with the greater seniority. On the company's motion, the district court vacated the arbitrator's award. 275 F. Supp. 776 (E.D. Pa. 1967). As did the court below here, the district court in *Honold* made its own analysis of the agreement and concluded that the arbitrator's interpretation was wrong. It reasoned that the employee with the longer seniority was clearly ineligible for the new job in question because of the provision denying a newly assigned employee reassignment for six months. To the court this was so clear and unambiguous as not to permit of a different result. In language similar to the court below's, it said:

> "*In unequivocal and unambiguous language,* it [the agreement] provides that 'employees who have applied for such new jobs and have been assigned to fill such jobs will not be eligible to apply for any other posted job for a period of six months (6) from the date of his transfer into such posted jobs * * *'.
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> * * * * *
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> "The arbitrator's award, which is before us, sheds no light upon the reasons for his decision. *It is sufficient that his award appears to be in clear violation of the express language of the contract.* He may not rewrite the express language of the contract.
>
> * * * * *
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> "We are concerned with the express language of the agreement, Fletcher's ineligibility, and the arbitrator's award *in violation of the express language of the agreement.*" 275 F. Supp. at 779 (our emphasis).

The Third Circuit rejected this simplistic approach and enforced the award, saying:

> "[W]e hold that a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." (p. 44a *infra*).

The court's analysis (pp. 44a-52a *infra*) is a warranted rebuff to the rationale advanced by the district court in *Honold* and the court below in this case—that the arbitrator's award could be denied enforcement on the ground that the agreement was so clear as not to be susceptible of interpretation.

Unfortunately, the court below's rationale has also been employed by the Fourth Circuit. In *Textile Workers Union Local 1386 v. American Thread Co.*, 291 F. 2d 894 (4th Cir. 1961), the court, as did the court below, read the agreement as giving the company the clear right to impose any measure of discipline it pleased on an employee whose misconduct constituted just cause. The court refused to enforce an award in which the arbitrator found that the employee's conduct was just cause, but ruled the measure of discipline (discharge) inappropriate to the misconduct involved and reduced it. The court said:

> "We are not persuaded that the Supreme Court in recent cases involving arbitration and the right of enforcement of arbitration agreements, intended that the courts should permit an arbitrator to render decisions *which do such violence to the clear, plain, exact, and unambiguous terms of the submission and the contract of the contending parties.*" 291 F. 2d at 899 (our emphasis).

We ask the Court to grant *certiorari* so that both the conflict with *Enterprise* (point 1, *supra*) and the above conflict between the circuits can be resolved.

3. The two questions presented by this case imply a further important question of federal labor contract law—does the variety of tests developed by the lower courts for applying Enterprise's "essence of the agreement" standard require examination by this Court?

In the nine years since this Court admonished, in *Enterprise,* that an arbitrator's award is not to be disturbed "so long as it draws its essence from the collective bargaining agreement" (363 U.S. at 597), the lower courts have been assiduous in developing their own tests for determining whether an award passes or fails the "essence" standard. (Some have focused on whether the award passes, other on whether it fails.) This development was surveyed recently by the Third Circuit in *Ludwig Honold Mfg. Co. v. Fletcher* (p. 37a *infra;* not yet officially reported):

> "*Enterprise* enunciated a basic philosophy that was to apply to all labor arbitration cases. It elevated the arbitrator to an exalted status—emphasizing that there would be no interference with his award simply because a reviewing court differed with him in its interpretation of provisions of the contract. At the same time, it held a checkrein on him—confining his zone of action to the four corners of the collective bargaining agreement. Although the language setting forth these guidelines was precise and uncomplicated, one problem has emanated from the cases which have followed *Enterprise:* that of formulating a consistent and workable standard to be utilized by the courts in exercising the function of review. Circuit and District Court decisions have not exuded uniformity in translating the 'essence' test into a pronouncement of the appropriate extent or limitation of judicial review of the arbitrator's interpretation.

"Each case seems to have fashioned its own standard, and among those variously employed have been: the reviewing court should not disturb the award so long as the interpretation was not arbitrary, *Local 7-644 Oil, Chemical & Atomic Wkrs. Int. U. v. Mobil Oil Co.*, 350 F. 2d 708, 712 (7 Cir. 1965), or 'even though the award permits the inference that the arbitrator may have exceeded his authority', *Brotherhood of Rail. Train. v. St. Louis Southwestern Ry. Co.*, 220 F. Supp. 319, 325 (E.D. Tex. 1963), or merely because it believes that sound legal principles were not applied, *Dallas Typographical Union v. A. H. Belo Corp.*, 372 F. 2d 577, 581 (5 Cir. 1967), the court should interfere 'where the arbitrator clearly went beyond the scope of the submission', *Textile Workers Union of America v. American Thread Co.*, 291 F. 2d 894, 897-98 (8 Cir. 1961), or where 'the authority to make . . . award cannot be found or legitimately assumed from the terms of the agreement', *Truck Drivers and Helpers Local 784, v. Ulry-Talbert Co.*, 330 F. 2d 562, 563 (8 Cir. 1964), or if the arbitrator made a determination not required for the resolution of the dispute, *Socony Vacuum Tanker Men's Ass'n v. Socony Mobile Oil Co.*, 369 F. 2d 480, 482 (2 Cir. 1966).

"Three decisions suggest no review whatsoever of the arbitrator's interpretations: construction and interpretation is not for the reviewing court, *Int'l Bro. Union No. 874 v. St. Regis Paper Co.*, 362 F. 2d 711 (5 Cir. 1966); there should be no review on the merits at all, *American Mach. & Fdry. Co. v. United A.A. & A. Imp. Wkrs*, 256 F. Supp. 161 (S.D. N.Y. 1963); *aff'd*, 329 F.2d 147 (2 Cir. 1964); review is confined to the question of whether the union agreed to arbitrate or give arbitrator power to make the award, *Western Iowa Pork Co. v. Nat'l Bro. Pack & Wrks.*, 366 F. 2d 275, 277 (8 Cir. 1966)." (pp. 39a-40a *infra*).

As their statement by the Third Circuit indicates, some of the tests appear faithful to *Enterprise* and the Trilogy principles, and some do not. Unfortunately, there are even more tests than those noted by the Third Circuit, two of which were employed by the court below in this case. We have already discussed the court below's principal test: is the agreement clear and unambiguous, for if it is, interpretation by an arbitrator was not permitted? Evidently aware of the conflict between this test and *Enterprise*, the court below employed a second: in deciding the case, did the arbitrator add terms to the agreement?[6] As noted in

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[6] In this case it is clear that the arbitrator, rather than adding terms, solidly based his decision on the provisions of the collective bargaining agreement. The requirement that the discipline given an employee for strike misconduct must be appropriate to the conduct involved was based on his interpretation of the selective discipline provision of the agreement. (See pp. 3-4 *supra*). The requirement that the company disclose the basis for discipline early in the grievance procedure was based on his interpretation of the provisions for a multi-step grievance procedure. (See pp. 3-4 *supra*). As the district court said:

> "The Court is of the opinion that the arbitrator's ruling that the exercise of selective discharge must be reasonable under the circumstances is a fair and logical inference from the agreement. Also, it is a reasonable inference that in the exercise of this power fair procedure must be adhered to. The requirements of a reasonable exercise of the selective discharge provision and the use of fair procedures in selective discharge provide a logical interpretation of the collective bargaining agreement." (p. 21a-22a *infra*).

Moreover, even had the arbitrator not based these requirements on specific provisions of the agreement, he would not have been adding terms to the agreement, for standard principles of contract construction, as well as the law of the shop imply a provision of fundamental fairness. As Archibald Cox said in *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 31 (1958): "Every contract, whether a typical commercial contract or a labor agreement contains 'an implied covenant of good faith and fair dealing.'" Accord, e.g.,: 3 Williston *Contracts*, §670 (Rev. ed. 1963); *Kirke LaShelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87; *Celanese Corp. of America*, 14 Lab. Arb. 31 (1950).

point 1, *supra*, the clear-and-unambiguous test has been employed by at least one other court. *Textile Workers Union, Local 1386 v. American Thread Co.*, 291 F. 2d 894 (4th Cir. 1961). Unfortunately, the adding-terms-to the-agreement test has had other use, too: *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F. 2d 677, 681-82 (1966); *Textile Workers Union Local 1368 v. American Thread Co.*, 291 F. 2d 894, 899-900 (4th Cir. 1961); *International Union of Electrical Workers, Local 791 v. Magnavox Co.*, 286 F. 2d 465, 467 (6th Cir. 1961); though some courts have rejected it: *Western Iowa Pork Co. v. Packinghouse Workers, Local 52*, 366 F. 2d 275, 287 (8th Cir. 1966); *Oil, Chemical & Atomic Workers Local 7-644 v. Mobil Oil Co.*, 350 F. 2d 708, 711 (7th Cir. 1965). Moreover, there are at least two additional tests which have been employed. (1) Did the arbitrator exceed his authority? E.g.: *Truck Drivers Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562, 565 (8th Cir. 1964); *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F. 2d 677, 680 (2d Cir. 1966); *Rubber Workers Local 135 v. Dunlop Rubber Co.* (concurring opinion of Judge Moore), 391 F. 2d 897, 900 (2d Cir. 1968). (2) Does the award violate public policy? E.g.: *Southern Conference of Teamsters v. Red Ball Motor Freight, Inc.*, 374 F. 2d 932 (5th Cir. 1967); *International Union of Electrical Workers Local 453 v. Otis Elevator Co.*, 206 F. Supp. 853 (S.D.N.Y. 1962), *rev'd*, 314 F. 2d 25 (2d Cir. 1963).

One of the basic teachings of Enterprise is that if it can be inferred that the arbitrator based his decision on the agreement, his award must be enforced:

> "The opinion of the arbitrator . . . is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a con-

> struction of the agreement itself, perhaps with the arbitrator looking to 'the law' for help in determining the sense of the agreement. *A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.*" 363 U.S. at 597-98 (our emphasis).

While many courts have followed this basic directive,[7] it appears that others have not. It appears, indeed that some have employed a completely different rule of law; that they have concluded that if, in their view, the arbitrator's decision is wrong, and it can be inferred that he did not base it on the agreement, enforcement will be denied. Typically, the court grounds such action on one of the tests discussed above, to give it the semblance of fidelity to *Enterprise* and the Trilogy (see the cases noted *supra*, p. 19).

At best, therefore, we have what the Third Circuit called attention to in *Ludwig Honold Mfg. Co. v. Fletcher* (pp. 39a-40a *infra*)—a bewildering assortment of tests for determining whether an award meets the "essence" standard; some good, some bad, some in between. Even if this is the extent of the problem, review and clarification by this Court is vital. Without it, the present confusion would be compounded. At worst, we are confronted with two rules of law—one under which an award will be enforced if it can possibly be inferred that it was based on the agreement, and one under which an award will be vacated if it can possibly be inferred that it was not based on the agree-

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[7] E.g.: *Rubber Workers Local 135 v. Dunlop Tire Co.*, 391 F. 2d 897 (2d Cir. 1968); *Safeway Stores v. American Bakery Workers Local 111*, 390 F. 2d 79 (5th Cir. 1968); *Anaconda Company v. Great Falls Mill & Smeltermen's Local 16*, 402 F. 2d 749 (9th Cir. 1968); *Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777*, 398 F. 2d 735 (7th Cir. 1968); *Ludwig Honold Mfg. Co. v. Fletcher* (p. 37a *infra*; not yet officially reported).

ment. The dangers from this possibility are clear. First, a situation in which the same contract term would have different meanings depending upon whether enforcement was sought in Pennsylvania or Tennessee—an intolerable situation. Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103. Ultimately, perhaps, total subversion of the Trilogy principles, with the courts back in the business of interpreting collective bargaining agreements.[8]

It is evident, we submit, that the garden this Court so carefully planted in the Trilogy has become tangled with weeds. The various "essence" tests require review by this Court to determine which, if any, are helpful. If none is, then further articulation by the Court is needed.

In *Ludwig Honold v. Fletcher* (p. 37a *infra*) the Third Circuit, in addition to surveying other courts' "essence" tests, advanced its own, which we believe to be the most faithful yet to *Enterprise* and the Trilogy principles. The court said:

> "[W]e hold that a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." (p. 44a *infra*).

This rule of law promotes federal policy by permitting a reviewing court to disturb an arbitrator's award *only*

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[8] A substantial minority of the labor bar has expressed itself as totally hostile to the principles of the Trilogy and have, for years, sought condemnation of the decisions and legislative reversals. See e.g., ABA Section of Labor Relations Law, 1963 Proceedings—Part II, pages 196-225: Report of the "Special Warrior and Gulf Committee".

where there is "manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop". The rule seemingly applied by the court below, in contrast, permits the reviewing court to upset the award where it can infer that the arbitrator may not have based his award on the agreement. It is, we submit, abundantly clear that if the instant case had been reviewed under the *Honold* standard the award would have been enforced.

The Third Circuit's rule of law is faithful to this Court's *Enterprise* command that "A mere ambiguity . . . which permits the inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce the award." 363 U.S. at 598. It is that principle which the Third Circuit has explicated and clarified and which the Sixth Circuit has violated in this case.

In *Enterprise,* the Court said:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards." 363 U.S. at 596.

We submit that the federal policy of settling labor disputes by arbitration *is* being undermined by the proliferation of "essence" tests. We ask the Court to review this case so that the danger can be averted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 25, 1968.

THE ARBITRATOR'S AWARD AND OPINION

In the Matter of the Arbitration between
U.A.W. Local 342
and
Ross Gear Tennessee Plant
Grievances 3410, 3411, 3412, 3413, 3414, 3416, 3418

Award of Arbitrator

1. The grievances of Van E. Warren (No. 3413) and Mark Brockette (No. 3418) are allowed. These employees are to be reinstated to their employment with Ross Gear and Tool Company without loss of seniority or other rights associated with length of service. These employees are to be compensated for such loss of pay as they have suffered as a result of the Company's action in discharging them on July 9, 1964.

2. The grievances of Gail M. Tribble (No. 3410), Lewis C. Stone (No. 3411), Shirley L. Judkins (No. 3412), Delbert Storie (No. 3414), and Perry Carlton (No. 3416) are allowed. As of the beginning of the first work week subsequent to May 20 these employees are to be reinstated to their employment with the Ross Gear and Tool Company without loss of seniority or other rights associated with length of service. The requests of these employees for back pay are denied.

/s/ Paul H. Sanders,
Arbitrator

May 15, 1965
Case No. L-44057-MIA-L-144-64

Opinion of Arbitrator

[Dated May 15, 1965]

This case is concerned with the disposition of seven grievances, each protesting the discharge of a particular employee on July 9, 1964.

The seven grievances are those of Gail M. Tribble (No. 3410), Lewis C. Stone (No. 3411), Shirley L. Judkins (No. 3412), Van E. Warren (No. 3413), Delbert Storie (No. 3414), Perry Carlton (No. 3416) and Mark Brockette (No. 3418).

The arbitration hearing was conducted in Lebanon, Tennessee on January 22 and 23, 1965 before Paul H. Sanders as Arbitrator selected through the facilities of the American Arbitration Association. At the arbitration hearing the Union was represented by Mr. Lowell Goerlich, Attorney at Law, Washington, D. C. The Company was represented by Mr. Owen J. Neighbours and Mr. William E. Plane, Attorneys at Law, Indianapolis, Indiana.

Issue

The parties were in agreement that the Arbitrator should determine the disposition of each grievance under the facts established in the record and the controlling terms of the Collective Bargaining Agreement. It was stipulated that the entire case was properly before the Arbitrator for decision in accordance with the terms of the Collective Agreement and that all preliminary procedures had been carried out as specified in the Collective Agreement.

Factual Background

On July 8, 1964 there was a work stoppage at the Company's Plant. Two hundred fifteen employees in the bargaining unit clocked out and left the plant at approximately 10 A.M. on that date. On the same date a substantial number of employees who were scheduled to work on the second shift did not do so. On the following day (July 9, 1964) there were some two hundred thirty-six employees who were scheduled to work on the first shift who did not report at the scheduled starting time of 7 A.M. Employees on this shift did begin returning to work at approximately 11:30 A.M. on July 9. At 10:15 A.M. on July 9 the Company, through its Industrial Relations Manager, sent to each of the grievants involved in this case the following notice of discharge by wire:

> "BECAUSE OF YOUR PARTICIPATION IN AN ACTION IN VIOLATION OF SECTION I, ARTICLE 10 OF THE COMPANY-UNION AGREEMENT DATED FEBRUARY 15, 1963, YOU ARE DISCHARGED."

The same notice was sent to two other persons as to whom no grievances were processed to arbitration and at approximately the same time a copy was furnished to the Union.

A substantial number of employees stayed on their jobs and did not participate in the walk-out on July 8 and 9. The group of employees remaining on their jobs included the President and Vice President of the local Union. The records introduced at the hearing show that each of the seven grievants clocked out at approximately 10 A.M. on July 8 and did not clock in again during that work week.

Contract Provisions

The Collective Bargaining Agreement in effect between the parties contains the following provisions:

"Article II

MANAGEMENT RIGHTS

Section 1—The management of the Company's operations and direction of working forces, including but not limited to the right to employ, promote, demote, train, transfer, lay off, retire, "discipline, suspend, discharge, to assign work and determine the number of hours to be worked, to increase and decrease the working force, to establish production standards and methods, to determine production to be handled, produced, manufactured or sold, to schedule the production, to subcontract work, transfer operations, to close the plant, and to make such rules and regulations in connection with the Company's operations and the conduct and duties of its employees as are deemed advisable is vested exclusively in the Company, subject only to such limitations as are specifically set forth in this Agreement."

"Article III

REPRESENTATION

"*Section 4*—Stewards and Committeemen will be expected to investigate and present grievances and to perform their duties otherwise before and after work, during lunch periods, rest periods or other time outside of woking hours."

"Article IV

GRIEVANCE PROCEDURE

"*Section 1*—A dispute that may arise between an employee and the Company as to the application, interpretation or compliance by the Company with the provisions of this Agreement shall constitute a grievance within the meaning of this Agreement. Grievances may be filed and processed through the procedure outlined herein.'

Section 2— . . .

Step 6. If such a grievance shall be advanced to Step 6 (arbitration), the matter shall be submitted to an impartial arbitrator mutually agreed upon between the parties. . . . The Arbitrator shall not have the power to add to or subtsact from or modify any of the terms of this Agreement or any agreement supplemental hereto. Only disputes which are within the defintion of a grievance set forth in Section 1 of this Article shall be subject to the arbitration provisions of this Agreement, and the Company shall not be required to submit any such disputes to an arbitrator for the determination of its arbitrability. In the event the Company refuses to comply with the arbitration provisions of this Agreement on the grounds that the dispute or alleged grievance is not arbitrable, the Union's remedy shall be by an action at law for breach of contract and not by arbitration. The arbitrator shall be bound by the provisions of this Agreement. Any decision by an arbitrator contrary to such provisions shall not be binding on either party and shall not be enforceable through legal proceedings except upon a determination by the court de novo that the arbitra-

tor's decision is not contrary to the provisions of the Agreement.

"*Section 3*—No grievance shall be considered if not filed purusant to this procedure within five days after the occurrence of the event out of which the grievance arose. A grievance concerning an alleged improper discharge or suspension shall be presented directly to Step 4 of the procedure xxx."

"Article X

GENERAL PROVISIONS

"Section 1—During the terms of this Agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike, picketing, slow-down or other curtailment or restricting of production or interference with work in or about the Company's plant or premises. Correlative with this provision, the Company agrees not to engage in a lockout. The parties recognize the right of the Company to take disciplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants and also recognize that officials of the Union may be subject to such disciplinary action, not only for their participation in a violation of this Section but also for any failure on their part to take appropriate steps to avoid violation of this Section by other employees."

Discussion

The Arbitrator must determine in this case whether the penalty of discharge imposed on the seven grievants was proper or improper in each instance. The right of the Company to discipline and discharge is not an unfettered one. Section 3 of Article IV of the Collective Agreement makes it clear that a grievance may be filed concerning an allegedly improper discharge or suspension. If such a grievance is filed and if it is processed to arbitration, the Arbitrator is obliged to determine whether the discharge is in fact "proper" or "improper." The propriety of the discharge penalties imposed in this instance thus becomes the central matter for inquiry. Whether or not the discharge penalty is proper can involve questions as to the substantive rule being applied, the existence of a sufficient factual basis for applying a particular rule, as well as the appropriateness and fundamental fairness of the procedure followed in the application of the rule.

The substantive rule invoked in this case is Article X, Section 1, and attention must first be given to its interpretation and legality. The Union argues that Article X, Section 1 allows a strike by non-members of the Union, but prohibits a strike by the Union or employees as members of the Union. By penalizing Union members for engaging in a strike while exonerating non-members, it is asserted that the provision is discriminatory and in violation of the National Labor Relations Act since it encourages employees to refrain from membership in the Union in order to escape the sanctions imposed by Article X, Section 1. It follows, the Union argues, that the contractual provision is void as against public policy and the employer may exercise no rights under its provisions. In a closely related argument the Union asserts that Article X, Section 1 pro-

hibits a work stoppage only by the Union and members of the Union and hence has no application to a walk-out by non-Union members or employees in their capacity as employees rather than as members of the Union. The Union asserts in this connection that, since there was no evidence that the walk-out was either sponsored by the Union or members of the Union in that relationship, it was not the kind of strike banned by Article X, Section 1.

The Company does not address itself to either of the above arguments which suggest the inapplicability or the illegality of Article X, Section 1 because of a distinction between restrictions imposed on Union members and non-members. The Company has stressed the fact that each of the grievants participated in the prohibited strike and that under Article X, Section 1 this empowered the Company to impose the discharge penalty. Under Article X, Section 1 of the Company argues, it is empowered to engage in a selective discharge of participants. Although the Company, under the Agreement, declares it was empowered to make selective discharges for participation in a prohibited strike, the Company asserts that it chose for discharge those employees who appeared to have been active in encouraging other employees to participate in the strike. As stated before, the Company at no time suggests that there is a distinction between employees who are members of the Union and employees who are not such members insofar as the restrictions of Article X, Section 1 against participating employees are concerned.

The question raised by the Union is a serious one. If Article X, Section 1 is to be interpreted as penalizing employees who are Union members for conduct which would be privileged if they were not such members, then it would, undoubtedly, be contrary to public policy if not positively illegal. Unions, when certified or recognized as collective bargaining agents, are obligated to secure identical bene-

fits for all employees in the collective bargaining unit without regard to whether such employees are members of the Union or not. Similarly, if no restrictions or penalties are imposed on employees by the Collective Agreement, the restrictive features must be applicable to members and nonmembers alike among employees in the collective bargaining unit. Special obligations may properly be undertaken by the Union as an organization or with respect to officers and representatives of the Union. Employees generally, however, may not be benefited or penalized in the Collective Agreement on the basis of Union membership. The Arbitrator should not, however, readily find that the proper meaning of Article X, Section 1 is a meaning which is contrary to public policy or perhaps illegal. On the contrary, it should be presumed that the proper meaning of Article X, Section 1 is a meaning which would be consistent with public policy and would raise no doubts as to legality. The Arbitrator is persuaded and finds that the phrase "employees who participate in a violation" as it appears in Article X, Section 1 refers, in fact, to all employees in the collective bargaining unit and makes no distinction on the basis of membership or non-membership in the Union. It follows that Article X, Section 1 is not void as against public policy and is in general applicable to employees who engage in work stoppages during the term of the contract.

Another argument of the Union must be dealt with before coming specifically to the application of Article X, Section 1 to the facts developed in this case. On several occasions during the course of the hearing in this case the Union suggested that the Company was guilty of such provocation that in effect its practices produced the walkout which led to the discharges. In effect the Union was suggesting that the conduct of the Company in the treatment of Union representatives, in the processing of griev-

ances, and specifically in the manner in which it handled the grievances of employee Eugene Pryor aggravated the employees so as to produce the work stoppage on July 8. On the basis of this background the Union argued that whether Article X, Section 1 was inapplicable to a walkout provoked by the Company or that the Company should not be heard to assert a right to impose a discharge penalty on employees who did walk out.

The Arbitrator has considered the material in the record relating to the subject of Company provocation and has noted particularly the refusal of the Company to meet with the Union President on the morning of July 8 with regard to a grievance by employee Eugene Pryor. The Arbitrator does not believe that the record provides any substantial basis for concluding that the Company deliberately sought to provoke the walkout on the morning of July 8. With respect to the grievance of Eugene Pryor it appears that a meeting had been scheduled between the Company and the Union for the afternoon of July 8 and the Arbitrator does not find that there is any substantial evidence which would permit him to conclude that the Company acted improperly in refusing to meet during working hours on the morning of July 8 with regard to the Pryor grievance. The Arbitrator does not believe that it is his function to sit in judgment upon the attitude or method of the parties in the matter of grievance processing and settlement unless conditions are shown to be so extreme as to have a direct bearing upon the issues which are before the Arbitrator. The evidence in this case is not sufficient to establish the existence of conditions which would prevent or estop the Company Management from being able to apply Article X, Section 1 to the situation that developed on the morning of July 8, 1964.

Under Article X, Section 1 the Company has power to impose selective discipline, that is, the disciplinary action,

including discharge, which the Company is empowered to take need not be imposed upon all employees who are equally guilty of participating in a violation of the section. This provision for selective discipline does not, however, preclude an inquiry into the reasonableness of the particular penalty under all the circumstances even though that penalty need not be necessarily imposed upon all who are equally guilty. In the present case the Company obviously did not discharge or discipline in any way many of the employees who participated in the walk-out on the morning of July 8. While the Company's wire announcing the discharge referred to the particular employees' "participation in an action in violation of Section 1, Article X," the Company actually chose for discharge those employees who were determined to have been active in encouraging other employees to participate in the strike. Employees chosen for discharge were those who were reported to have encouraged employees to leave by what they said or by the motions they made with their hands and arms. Thus the Company did not charge any of the employees with formulating or responsibly carrying out plans for the work stoppage. The Company did not select employees for discipline or discharge on the basis of those leaving their jobs or departments first or those clocking out first or those leaving the plant first. It is clear also that the Company did not choose to make mere participation in any degree the basis of its selection of employees to be disciplined. The Company, instead, chose to select for discipline those employees who must have been judged to be more responsible than their fellow employees because of what they were reported to have said or done in connection with the walkout. The Company, in fact, purported to discharge every employee who was reported to have actively encouraged others to participate in the strike. The Arbitrator believes that under Article X, Section 1 the Company

was entitled to utilize "active encouragement of others to strike" as a standard for the selection of employees who were subject to discipline. It is not necessary to debate the extent to which the discharge penalty could be imposed upon certain types of participation in a strike. In any event, it is clear that the discharge penalty under the terms of Article X, Section 1 could appropriately be used for those persons who are shown by a sufficiency of evidence to have actively encouraged other employees to strike.

There is a substantial question in this case with regard to procedural fairness. It will be appropriate next, however, to consider the application of the Company's anaounced standard, "active encouragement of others," to the seven grievants involved in this case. The evidence as introduced by the Company indicated that grievants Stone, Judkins, Storie and Carlton waved their arms toward the time clock or exit and shouted words such as "come on" and "let's go" as the employees were leaving their jobs around 10 A.M. on July 8. Company evidence also showed that grievant Tribble motioned with his arms for the employees to come toward him at the aisle shortly before he clocked out at approximately 10 A.M. on July 8. Company evidence also showed that grievant Brockette was heard to say "let's go" at 10 A.M. to grievant Carlton just before they left their department. The Company's evidence also showed that an employee was observed at one of the time clocks shortly after 10 A.M. motioning with his hand toward the exit and saying in a loud voice "let's go, boys." The Company witness who made this observation checked through other persons and determined that it was grievant Warren. Each of the grievants denied that he motioned with his arms or shouted in the manner stated in the Company evidence. The Union also introduced testimony of other witnesses indicating that particular indi-

viduals had not waved their arms or shouted encouraging words as the employees were checking out and leaving the plant.

There is a flat contradiction in the testimony as between the grievants and the Company witnesses with regard to the conduct of the grievants. The Arbitrator does not believe that it would be worth while to try to set forth in great detail all aspects of this conflict or to resolve each separate issue or sub-issue of fact. The Arbitrator has examined the entire record carefully and it is his judgment that there is substantial credible evidence to support the finding that grievants Stone, Judkins, Tribble, Storie and Carlton actively encouraged other employees to participate in the strike. In other words, the record in this case shows sufficient evidence to establish that these five employees were deserving of discipline under the standard that the Company was utilizing and which it was entitled to utilize under Article X, Section 1. A special comment should be made about grievant Tribble. Tribble, a Union Steward, clocked out at 10:01 A.M. on the morning of July 8. His testimony and that of certain other Union witnesses tended to indicate that he left the plant to go to the Union hall in order to try to induce the employees to return to work. He stated further that instead of motioning the employees to come toward him and leave the plant he might have been seeking to encourage them to remain at work through his hand motions. The Arbitrator has already indicated that he has credited the Company testimony with regard to the action of Tribble. It might also be mentioned in this connection that his grievance as originally filed makes no reference at all to his asserted claim that he clocked out so as to seek to bring an end to the walk-out by the other employees.

The record with regard to grievant Brockette shows, according to Company testimony, that he stated to a fellow employee "let's go" right at 10 A.M. Brockette himself denied having said this. The evidence indicates that it would have been very difficult for the Company observer to have overheard such a statement. In the opinion of the Arbitrator, however, the record fails to show any substantial basis for concluding that Brockette could be said to have actively encouraged other employees to engage in the strike. In the opinion of the Arbitrator the record is similarly deficient with respect to substantial evidence which would indicate that grievant Warren was guilty of actively encouraging other employees to engage in the strike. The witness who allegedly saw Warren wave his arm and shout some words did not know him by name. In seeking to identify the person in the midst of a large group of employees who were clocking out the Company witness checked first with another person and then was referred to the alleged supervisor. By word of mouth description the witness determined that the man he had seen was Warren. The Arbitrator does not believe that there is a sufficient evidentiary basis for the identification in this case. The time records show that Warren clocked out at 10:03 A.M. The Company witness who allegedly observed him from some distance away in the midst of a crowd of men stated that he was approximately the one hundredth man in a group of one hundred fifty employees who were checking out and leaving the plant. The Arbitrator finds that there is not a substantial basis in the competent credible testimony to establish that grievant Warren was guilty of actively encouraging others to participate in the strike.

The Arbitrator has found that there was a sufficient factual basis for the Company to conclude that grievants

Tribble, Stone, Judkins, Storie and Carlton were guilty of actively encouraging other employees to participate in the strike. The Arbitrator believes, however, that as to these five grievants the discharge penalty should be set aside because the procedure followed by the Company was lacking in fundamental fairness. The record shows that the employer in this case did not advise any of the grievants or the Union as to the basis for discharging the grievants either prior to discharge or thereafter. The record makes it clear that the Company did not advise the Union or any of its representatives or the employees with regard to any of the incidents allegedly showing active encouragement of the strike by the grievants. It is clear in the record that after reports were received from various repesentatives of Management allegedly indicating active encouragement there was no effort to check with the employee involved or with any other employee who might have information to discover such additional facts as might be available. Thus the ultimate penalty of discharge was imposed on the basis of written reports without any opportunity being given the affected employees to explain or answer or give any information that they might have with regard to the matter reported. In addition, the Company's notice of discharge which was given to the affected employees and to the Union made no reference to the real basis of the discharge. Apparently there was no indication to the employees or to the Union prior to the arbitration hearing that the Company had acted on the basis of the belief that the discharged employees had actively encouraged other employees to strike.

The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to

discharge an employee without informing him of the charges against him and without affoffrding some opportunity for objective investigation. In any event, for the Company to withhold the real basis for discharge while a grievance is being processed results in preventing the grievance machinery from carrying out its intended function.

In light of the procedure followed in this case the Arbitrator believes that the grievances of Stone, Judkins, Tribble, Storie and Carlton should be allowed and that these employees should be reinstated to their employment without loss of seniority or other rights associated with length of service. Because it has been found that the Company, in fact, had a basis for imposing discipline on these employees there will be no provision for back pay.

/s/ Paul H. Sanders
Paul H. Sanders, Arbitrator

THE DISTRICT COURT'S MEMORANDUM OPINION AND JUDGMENT

In the United States District Court for
The Middle District of Tennessee

Local 342, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO, et al., Plaintiffs, v. TRW, INC., Defendants.	}	Civil Action No. 4246

MEMORANDUM

[Filed June 12, 1967]

The defendant in this action is the successor to the Ross Gear and Tool Company which operated a plant at Lebanon, Tennessee. During the period relevant to this action, there was a collective bargaining agreement in effect between the plaintiff and the Ross Gear and Tool Company covering the employees of the Lebanon plant. Plaintiff instituted this action pursuant to 29 U.S.C.A. §185 to enforce an arbitrator's award made under the bargaining agreement and in favor of seven individuals who were employed by the defendant. The defendant asserts that the award is not entitled to enforcement because it contravenes the provisions of the collective bargaining agreement. The action is before the Court on motions of both parties for summary judgment.

On July 8, 1964, over two hundred employees in the bargaining unit covered by the agreement between plaintiff

and defendant walked off their jobs. The employees clocked out at approximately 10 o'clock a.m. on that day. The seven employees involved in this action were among those who clocked out. On the following day, the defendant sent telegrams to each of the seven employees involved in this action and two other employees notifying them of their discharges. The notices read as follows: "BECAUSE OF YOUR PARTICIPATION IN AN ACTION IN VIOLATION OF SECTION I, ARTICLE 10 OF THE COMPANY-UNION AGREEMENT DATED FEBRUARY 15, 1963, YOU ARE DISCHARGED." The seven employees invoked the grievance procedure outlined in the collective bargaining agreement and the question of the propriety of the discharges was submitted to an arbitrator.

The collective bargaining agreement in force at the time of the walkout stated in regard to work stoppages that:

> Durinng the term of this Agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike, picketing, slow-down or other curtailment or restricting of production or interference with work in or about the Company's plant or premises. Correlative with this provision, the Company agrees not to engage in a lock-out. The parties recognize the right of the Company to take disciplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants. . . ."

With regard to grievance procedures, the agreement states that:

> A dispute that may arise between an employee and the Company as to the application, interpretation or compliance by the Company with the provisions of

> this Agreement shall constitute a grievance within the meaning of this Agreement. Grievances may be filed and processed through the procedure outlined herein.
>
> . . . If such grievance shall be advanced to step 6 (arbitration), the matter shall be submitted to an impartial arbitrator. . . . The Arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto. Only disputes which are within the definition of a grievance set forth in Section 1 of this Article shall be subject to the arbitration provisions of this Agreement. . . . The arbitrator shall be bound by the provisions of this Agreement. Any decision by an arbitrator contrary to such provisions shall not be binding on either party and shall not be enforceable through legal proceedings except upon a determination by the court de novo that the arbitrator's decision is not contrary to the provisions of the Agreement.

The arbitrator, after considering the applicability of provisions of the collective bargaining agreement relating to work stoppages and union contentions to the effect that the company should bear responsibility for the strike because of its actions, determined that "the propriety of the discharge penalties imposed in this instance" was the central matter for inquiry. Concerning the nature of the discharges, the arbitrator found that:

> It is clear also that the Company did not choose to make mere participation in any degree the basis of its selection of employees to be disciplined. The Company, instead chose to select for discipline those employees who must have been judged to be more responsible than their fellow employees because of what they were reported to have said or done in connection with the walk-out. The Company, in fact, purported

> to discharge every employee who was reported to have actively encouraged others to participate in the strike.

The arbitrator concluded that the standard apparently adopted by the defendant was a proper standard for discharge under the collective bargaining agreement. Applying this standard to the seven employees involved in this action, he found that two of these employees, Warren and Brockette, were improperly discharged because they were not shown to be guilty of actively encouraging others to strike although they were reported as being guilty of such behavior.

The arbitrator found that the remaining five employees, Tribble, Stone, Judkins, Storie, and Carlton, were guilty of actively encouraging others to strike. He found that their discharges were improper, however, because improper procedures were followed in these discharges. The improper procedures consisted of the company's failure to notify the employees of the exact nature of the charges against them with the result that the employees were not afforded an opportunity for objective investigation of the charges. In the words of the arbitrator:

> The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case.

The award of the arbitrator ordered the reinstatement of each of the seven employees involved in this action. The two employees found not to have actively encouraged others to participate in the strike were ordered reinstated with back pay. The remaining five employees were ordered reinstated without back pay since, in the arbitrator's opinion, the company had "a basis for imposing discipline on these employees."

The defendant contends that the arbitrator's award is contrary to the provisions of the agreement and is therefore not entitled to enforcement. In determining whether the defendant is correct in this contention, it must be remembered that the Court is severely limited in its powers of review of an arbitrator's award. Clearly, "the refusal of the courts to review the merits of an arbitration award is the poper approach to arbitration under collective bargaining agreements." *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U. S. 593, 596 (1960). The *Enterprise Wheel* case broadened the arbitrator's authority to make awards by holding that while an arbitrator must draw the essence of his award from the collective bargaining agreement, he could be guided by many sources in interpreting and applying the agreement to the dispute. Judicial review of arbitration awards is limited to examination of the arbitrator's jurisdiction to arbitrate the dispute and his authority to fashion and render an award. A judicial examination of the merits is improper.

In this case the collective bargaining agreement provides that disputes as to the application, interpretation, or compliance by the company with the provisions of the agreement constitute grievances and may be subject to arbitration. The arbitrator found that the defendant failed to comply with both its apparent disciplinary standards and standards of procedural fairness. These standards do not appear explicitly in the provision of the agreement which states that for violation of the "no strike" provision the company can discharge all of the participants or only selected participants.

The arbitrator found that while the company did have this explicit power of selective discipine, an inquiry into the reasonable use of this power was not precluded. The Court is of the opinion that the arbitrator's ruling that the

exercise of the power of selective discharge must be reasonable under the circumstances is a fair and logical inference from the agreement. Also, it is a reasonable inference that in the exercise of this power fair procedure must be adhered to. The requirements of a reasonable exercise of the selective discharge provision and the use of fair procedures in selective discharge provide a logical interpretation of the collective bargaining agreement. By finding that it was implicit in the collective bargaining agreement that the power of selective discharge does not allow either an arbitrary selective discharge or the use of unfair procedure in affecting such a discharge, the arbitrator acted well within his authority. He did not violate the essence of the agreement nor did he in any way manifest an infidelity to his obligation. The arbitrator does not exceed his authority when he finds substantive rights and duties which are implied though not expressed in the agreement. *Lodge No. 12, Machinists v. Cameron Iron Works,* 292 F.2d 112 (5th Cir. 1961). The Supreme Court has said:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . *United Steelworkers v. Warrior & Gulf Navigation Co.,* 336 U.S. 574, 581-82 (1960).

The finding of the arbitrator that actual encouragement of others to strike was the company-adopted standard is a finding of fact, within the discretion of the arbitrator, which will not be overturned on appeal to this Court. All questions of interpretation and application are left to the arbitrator and the Court may not weigh the merits of a dispute. *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 568 (1960).

One further contention of the defendant remains to be dealt with. The defendant contends that in this case the Court is not bound by the usual rules of judicial review discussed above and by the conclusion reached by the arbitrator but rather may look into the merits of the controversy, examining the agreement anew and applying its own contractual interpretation. This contention is based upon Article IV of the agreement which provides:

> The arbitrator shall be bound by the provisions of this Agreement. Any decision by an arbitrator contrary to such provisions shall not be binding on either party and shall not be enforceable through legal proceedings except upon a determination de novo that the arbitrator's decision is not contrary to the provisions of the Agreement.

This clause in the agreement, however, does not give the Court the right to make an independent appraisal of the agreement. A careful reading of this provision clearly indicates that it is merely an express acknowledgement by the parties of the general principle of arbitration award enforcement enunciated by the Supreme Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), where the Court held that an arbitrator's award is never final and binding if he exceeds the limitations imposed upon him by the bargaining agreement. To hold otherwise would subvert and render meaningless the arbitration process. Furthermore, a literal reading of the clause indicates that it is not every decision by an arbitrator that is not binding except upon a court determination but only those decisions where the arbitrator has acted contrary to the provisions of the agreement. In the present case the arbitrator has not so acted.

Since the arbitrator did not exceed the scope of his authority granted by the collective bargaining agreement, the finding that the employees Warren and Bockette were improperly discharged because they were not shown to be guilty of actively encouraging others to strike and that they should be reinstated with back pay is not invalid. Likewise, the finding that the employees Tribble, Stone, Judkins, Storie, and Carlton were discharged without fair procedure and that these employees should be reinstated without back pay is approved.

Accordingly, a form of judgment will be submitted denying defendant's motion for summary judgment, granting plaintiff's motion for summary judgment in conformity with this memorandum, and directing enforcement of the arbitrator's award.

/s/ Wm. E. Miller
United States District Judge

JUDGMENT ENTRY

[Filed June 29, 1967]

This cause having come on to be heard on defendant's motion for summary judgment and on plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action, the affidavits, and exhibits filed in support of the respective motions, and having considered the briefs of counsel and heard oral argument, and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that plaintiff is entitled to judgment as a matter of law as indicated in the Court's Memorandum filed in this cause dated June 12, 1967, and that defendant's motion for summary judgment should be denied,

IT IS HEREBY ORDERED that defendant's motion for summary judgment be and is denied and that plaintiffs' motion for summary judgemnt be and is granted.

IT IS THEREFORE ADJUDGED, DECLARED ORDERED, AND DECREED that the Arbitration Award the validity of which is presented and the enforcement of which is sought in this case and under the terms of which Arbitration Award it was ordered that employees Warren and Brockette be reinstated by defendant to their employment with back pay from the date of their discharge and that employees Tribble, Stone, Judkins, Storie, and Carlton be reinstated by defendant to their employment but without back pay, is valid and is binding upon the defendant.

IT IS FURTHER ORDERED AND DECREED that said Arbitration Award be enforced in all particulars and that defendant be and is now ordered to comply with the same in all particulars.

/s/ Wm. E. Miller
Judge

THE COURT OF APPEALS' DECISION

No. 18139

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Local 342, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO.
Van E. Warren,
Mark Brockette,
Gail M. Tribble,
Lewis C. Stone,
Shirley L. Judkins,
Delbert Storie and
Perry Carlton,
Plaintiffs-Appellees,

v.

T.R.W., Inc.,
Defendant-Appellant.

Appeal from the U. S. District Court for the Middle District of Tennessee.

Decided October 23, 1968.

Before: O'Sullivan and Phillips, Circuit Judges, and Cecil, Senior Circuit Judge.

O'Sullivan, Circuit Judge. T.R.W., Inc., a manufacturer with a plant at Lebanon, Tennessee, appeals from a judgment of the District Court for the Middle District of Tennessee enforcing an arbitrator's award which directed reinstatement of seven of appellant's employees who had

been discharged for striking in violation of a collective bargaining contract. The contract was the product of bargaining between the company and appellee union—Local 342, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO—and provided in its Article X that:

> "Section 1—During the term of this agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike, picketing, slowdown or other curtailment or restricting of production or interference with work in or about the Company's plant or premises. * * * The parties recognize the right of the Company to take disciplinary action, *including discharge, against any employees* who participate in a violation of this Section, whether such action is taken against all of the participants *or against only selected participants* * * *." (Emphasis supplied.)

On July 8, 1964, in violation of the agreement, more than two hundred of appellant's employees walked off their jobs, including the seven individual appellees, Van E. Warren, Mark Brockette, Gail M. Tribble, Lewis C. Stone, Shirley L. Judkins, Delbert Storie and Perry Carlton.

The next day, before any of the strikers had returned to work, appellant company sent a telegram to each of the above seven. It read as follows:

> "Because of your participation in an action in violation of Section 1, Article 10 of the company-union agreement dated February 15, 1963, you are discharged."

Grievances were filed, the company refused to withdraw the discharges, and the matter went to arbitration. The arbitrator's award, entered May 15, 1965, directed the reinstatement of all of the individual appellees and ordered that two of them be compensated for loss of pay from the date of their discharge, July 9, 1964. It was disclosed during the course of the grievance procedure or at the hearing before the arbitrator that the reason the seven appellees were selected for discharge was the company's belief that they had been active ringleaders in encouraging other employees to participate in the strike. The company produced written reports identifying all seven dischargees as activists in the strike. On this subject, the arbitrator's opinion recites:

> "The Arbitrator has examined the entire record carefully and it is his judgment that there is substantial credible evidence to support the finding that grievants Stone, Judkins, Tribble, Storie, and Carlton actively encouraged other employees to participate in the strike. In other words, the record in this case shows sufficient evidence to establish that these five employees were deserving of discipline under the standard that the Company was utilizing and which it was entitled to utilize under Article X, Section 1."

After his above finding that five of the grievants were leaders of the strike, he exonerated the other two:

> "In the opinion of the Arbitrator, however, the record fails to show any substantial basis for concluding that Brockette could be said to have actively encouraged other employees to engage in the strike. In the opinion of the Arbitrator the record is similarly deficient with respect to substantial evidence which would indi-

> cate that grievant Warren was guilty of actively encouraging other employees to engage in the strike."[1]

Upon this finding, these two grievants were awarded back pay as well as reinstatement. It was his view that, notwithstanding that all seven appellees had engaged in the illegal strike, giving the company the right to discharge them, the company had a burden of proving to him that each of the grievants was in fact a leader in encouraging the illegal walkout. Although he found that the first mentioned five grievants had engaged in an illegal strike and were its ringleaders, he ordered all of them reinstated, the five without back pay. He did this upon his assumption that it was within his province to determine whether the company's exercise of its own contractual rights comported with his own notion of "fundamental fairness." He stated:

> "The Arbitrator has found that there was a sufficient factual basis for the Company to conclude that grievants Tribble, Stone, Judkins, Storie and Carlton were guilty of actively encouraging other employees to participate in the strike. The Arbitrator believes, however, that as to these five grievants the discharge penalty should be set aside because the procedure followed by the Company was lacking in fundamental fairness. The record shows that the employer in this case did not advise any of the grievants or the Union as to the basis for discharging the grievants either prior to discharge or thereafter.
>
> * * * * *

[1] This exoneration was the product of the arbitrator weighing the the evidence adduced at the hearing before him. The company produced evidence that both Brockette and Warren were activists in encouraging the walkout. They both denied the conduct charged to them. The arbitrator, upon his evaluation of the probative worth of the evidence and his finding as to credibility, absolved them both of actively encouraging the walkout.

> "The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to discharge an employee without informing him of the charges against him and without affording some opportunity for *objective investigation.*" (Emphasis supplied.)

The District Judge ordered the award of the arbitrator enforced. We reverse.

We consider that the company's contract with the union, of which all of the individuals were members, gave it a clear right to do what it did. The language of this contract was not ambiguous, nor did any of its terms require interpretation by the arbitrator or the courts.

Neither before the arbitrator nor the District Judge, nor in their address to this Court, did appellees contend that the appellant company did anything that was not its clear right under the contract. Appellees did not dispute the facts that:

a) There was a strike—a curtailment and restricting of production—an interference with work.

b) The seven dischargees were members of the union.

c) The dischargees all took part in the involved conduct which violated the contract.

Under these circumstances, the company had the right:

a) To take disciplinary action—including discharge—against any employee who participated in the described conduct, and

b) Such action could be taken against all *or against only selected participants.*

Nothing in the contract made the exercise of these rights subject to ultimate approval of an arbitrator or a court; neither was there a requirement of any preliminaries—prior notice or bilateral investigation. In ordering enforcement of the award, the District Judge said:

> "The arbitrator found that while the company did have this explicit power of selective discipline, an inquiry into the reasonable use of this power was not precluded. The Court is of the opinion that the arbitrator's ruling that the exercise of the power of selective discharge must be reasonable under the circumstances is a fair and logical inference from the agreement. Also, it is a reasonable inference that in the exercise of this power fair procedure must be adhered to."

The conduct of the arbitrator, thus approved by the District Judge, in reality constituted the addition of terms to a negotiated contract that was neither unclear nor incomplete. The arbitrator held that the company's way of exercising its contractual rights was lacking in *fundamental fairness.* He finds this fundamental unfairness in what he says was the company's failure to tell the employees why they were discharged. He said:

> "The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to discharge an employee *without informing him of the charges against him* and without affording some opportunity for *objective investigation.*" ((Emphasis supplied.)

But, were it necessary, each of the involved employees was told of the charge against him and the reason for his discharge. Each received a telegram advising that:

> "*Because* of your participation in an action in violation of Section 1, Article 10 of the company-union agreement dated February 15, 1968, you are discharged." (Emphasis supplied.)

The conduct which brought into being the company's right to discharge any employee was "participation in an action in violation of Section 1, Article 10, of the company-union agreement." All seven appellees were admittedly guilty of such a violation and were thereby subject to discharge without reference to whether they were or were not activists in promoting or encouraging others to join in an illegal strike. It was not for an arbitrator to add to the contract a provision that the above right to discharge would be lost unless the company had, in the turmoil and crisis of a strike, announced the reasons for the selectivity employed in exercising its rights and later had established that such reasons were, in the view of an arbitrator, sufficient to permit it to exercise the selectivity which was also an unqualified contractual right.

There is nothing in the contract calling for "objective investigation; neither does the arbitrator's opinion tell when and how, in the crisis of an illegal walkout, an "objective investigation" was to be had. The contract provides:

> "The arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto."

It appears to us that the company's right to selectively discharge participants in an illegal work stoppage was in-

tended to allow the company to deal quickly with such an emergency. The efficacy of its exercise is portrayed by the following factual findings of the arbitrator:

> "On July 8, 1964 there was a work stoppage at the Company's Plant. Two hundred fifteen employees in the bargaining unit clocked out and left the plant at approximately 10 A.M. on that date. On the same date a substantial number of employees who were scheduled to work on the second shift did not do so. On the following day (July 9, 1964) there were some two hundred thirty-six employees who were scheduled to work on the first shift who did not report at the scheduled starting time of 7 A.M. Employees on this shift did begin returning to work at approximately 11:30 A.M. on July 9. At 10:15 A.M. on July 9 the Company, through its Industrial Relations Manager, sent to each of the grievants involved in this case the following notice of discharge by wire."

Thus, hardly more than an hour after the grievants were discharged and the union notified of such fact, the employees began to return to work. It can be assumed that the contract provision which allowed the selective discharge of some of the participants in a walkout was the product of bargaining and that the company gave some *quid pro quo* to get it. An arbitrator should not be permitted to nullify it.

We consider that our own decision in *District 50, United Mine Workers v. Chris-Craft Corp.*, 385 F(2) 946 (6th Cir. 1967), supports our position here. The factual differences of that case do not destroy its appositeness to the case at bar. Some eight employees were chosen for discharge because they engaged in an illegal strike. These eight were apparently selected to be discharged out of a large group

of strikers because they were union officials. The company refused to arbitrate the validity of these discharges on the ground that discharge for participation in an illegal strike was the non-arbitrable prerogative of the company. We indicated that a clear provision of a collective bargaining contract should be enforced.

> "No provision of the agreement and no other evidence before the Court indicated that the parties contemplated conferring a broad power upon the arbitrator. To the contrary, all of the evidence indicated that the employer bargained for and retained this one form of discipline free from the arbitration procedure." 385 F(2) at 950.

The Fourth Circuit, in *Textile Workers Union v. American Thread Co.*, 291 F(2) 894 (1961), held that, after an arbitrator had unequivocally found that the discharged employee was in fact guilty of conduct constituting "just cause" for discharge under a collective bargaining agreement, he was not free to then measure the "appropriateness" of the penalty.

> "The reservation of a right to either discipline or discharge for cause would be wholly ineffective and meaningless if the employer's action, pursuant to such right, is subject to review by an arbitrator on the basis of appropriateness. If the reserved right is construed to mean that the employer can take no disciplinary action in excess of a reprimand, except at its own risk and subject to severe penalties in case an arbitrator should later be of the opinion that some milder action is appropriate, the effect would be that the employer's inherent right which has not been expressly relinquished by contract is no right at all." 291 F(2) at 899.

We see no reason to further indulge in dissertation or review of the cases which have dealt with the subject now under our consideration. The trilogy, *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1969); and *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), have set down the applicable rules. *Enterprise* announces the rule controlling this case.

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597.

Obeying that rule, we decide that the order of the arbitrator should have been denied enforcement. The judgment of the District Court is reversed, with direction to enter judgment dismissing the complaint.

THE COURT OF APPEALS' DENIAL OF PETITION FOR REHEARING

No. 18,139

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Local 342, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO.
Van E. Warren,
Mark Brockette,
Gail M. Tribble,
Lewis C. Stone,
Shirley L. Judkins,
Delbert Storie and
Perry Carlton,
Plaintiffs-Appellees,
v.
T.R.W., Inc.,
Defendant-Appellant.

ORDER

[Filed November 29, 1968]

Before O'Sullivan, Phillips, Circuit Judges, and Cecil, Senior Circuit Judge.

THIS CAUSE is before the Court upon a petition for rehearing and a suggestion that the petition be heard by the Court sitting en banc, and there being no request by any member of the Court that the hearing be held en banc, and upon due consideration of said petition,

IT IS ORDERED that said petition for rehearing be, and the same is, hereby denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

LUDWIG HONOLD MANUFACTURING COMPANY v. FLETCHER, and UNITED AUTOMOBILE WORKERS, LOCAL 416, No. 17087, January 14, 1969
U. S. Court of Appeals
Third Circuit (Philadelphia)

Appeal from the U. S. District Court for the Eastern District of Pennsylvania (66 LRRM 2458). Reversed.

Before Hastie, Chief Judge, and Seitz and Aldisert, Circuit Judges.

Aldisert, Circuit Judge:—The District Court vacated a labor arbitration award in a grievance case which involved a plant promotion. It held that the arbitrator had exceeded his authority in the interpretation of the collective bargaining agreement.

Fletcher, the employee who won the award, and his union, Local 416, have appealed from the order of the court below.[1]

Initially, it should be emphasized that this case does not involve the question of the dispute. We are not to decide whether the arbitrator had the power or jurisdiction to hear the grievance in question.[2] The parties agree that the grievance was a proper subject of arbitration. The controversy arises over the arbitrator's interpretation of provisions of the agreement, specifically, that portion governing the promotion of personnel within certain job classifications.

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[1] This case originated in the Court of Common Pleas of Delaware County, Pennsylvania, with plaintiff filing a rule to show cause why an arbitration award should not be set aside. It was removed to the District Court for the Eastern District of Pennsylvania upon petition of the defendants pursuant to §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185.

[2] Whether a grievance is arbitrable depends upon whether the parties agreed to submit the particular dispute to arbitration. See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960).

I. Before reaching the issue of whether the District Court erred in vacating the award, we have this threshold question to consider: what is the proper role of a court in reviewing an arbitrator's interpretation of provisions of a collective bargaining agreement?

The Supreme Court has addressed itself to this specific point in United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U. S. 593, 46 LRRM 2423 (1960): "It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[3]

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, *yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597, 46 LRRM 2423 (emphasis supplied).

Enterprise enunciated a basic philosophy that was to apply to all labor arbitration cases. It elevated the arbitrator to an exalted status —emphasizing that there would be no interference with his award simply because a reviewing court differed with him in its interpretation of provisions of the contract. At the same time, it held a checkrein on him—confining his zone of action to the four corners of the collective bargaining agreement. Although the language setting forth these guidelines was precise and

[3] 363 U.S. at 599, 46 LRRM 2423.

uncomplicated, one problem has emanated from the cases which have followed Enterprise: that of formulating a consistent and workable standard to be utilized by the courts in exercising the function of review. Circuit and District Court decisions have not exuded uniformity in translating the "essence" test into a pronouncement of the appropriate extent or limitation of judicial review of the arbitrator's interpretation.

Each case seems to have fashioned its own standard, and among those variously employed have been: the reviewing court should not disturb the award so long as the interpretation was not arbitrary,[4] or "even though the award permits the inference that the arbitrator may have exceeded his authority",[5] or merely because it believes that sound legal principles were not applied;[6] the court should interfere "where the arbitrator clearly went beyond the scope of the submission",[7] or where "the authority to make . . . award cannot be found or legitimately assumed from the terms of the agreement",[8] or if the arbitrator made a determination not required for the resolution of the dispute.[9]

Three decisions suggest no review whatsoever of the arbitrator's interpretations: construction and interpretation is

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[4] Local 7-644 Oil, Chemical & Atomic Wkrs. Int. U. v. Mobil Oil Co., 350 F.2d 708, 712, 59 LRRM 2933 (7 Cir. 1965).

[5] Brotherhood of Rail. Train. v. St. Louis Southwestern Ry. Co., 220 F. Supp. 319, 325, 54 LRRM 2357 (E.D. Tex. 1963).

[6] Dallas Typographical Union v. A. H. Belo Corp., 372 F.2d 577, 581, 64 LRRM 2491 (5 Cir. 1967).

[7] Textile Workers Union of America v. American Thread Co., 291 F.2d 894, 897-98, 43 LRRM 2534 (8 Cir. 1961).

[8] Truck Drivers and Helpers Local 734 v. Ulry-Talbert Co., 330 F.2d 562, 563, 55 LRRM 2979 (8 Cir. 1964).

[9] Socony Vacuum Tanker Men's Ass'n v. Socony Mobile Co., 369 F.2d 480, 482, 63 LRRM 2037 (2 Cir. 1966).

not for the reviewing court;[10] there should be no review on the merits at all;[11] review is confined to the question of whether the union agreed to arbitrate or give arbitrator power to make the award.[12]

In H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers, 333 F. 2d 596, 602, 56 LRRM 2534 (3 Cir. 1964), this court vacated an arbitrator's award because there was "no ground upon which to base his interpretation.[13]

A comparison of review standards employed in related proceedings merits attention. The National Labor Relations Board has said that in reviewing an arbitrator's award it would "give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate [the matter] unless it clearly appears that the proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities."[14]

Reviewng an appeal from a decison of the Railway Adjustment Board, the Supreme Court has ruled that the

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[10] Int'l Bro. Union No. 874 v. St. Regis Paper Co., 362 F.2d 711, 714, 62 LRRM 2483 (5 Cir. 1966).

[11] American Mach. & Fdry. Co. v. United A.A. & A. Imp. Wkrs., 256 F. Supp. 161, 54 LRRM 2184 (S.D. N.Y. 1963); aff'd., 329 F.2d 147, 55 LRRM 2684 (2 Cir. 1964).

[12] Western Iowa Pork Co. v. Nat'l. Bro. Pack & Wrks., 366 F.2d 275, 277, 63 LRRM 2503 (8 Cir. 1966).

[13] In Porter, we upheld one portion of the award though it was contrary to the literal language of the agreement, because there was a clear pattern of past practice which justified the deviation, 333 F.2d at 601.

[14] International Harvester Co., 138 NLRB 923, 51 LRRM 1155 (1962), aff'd sub. nom. Ramsey v. N.L.R.B., 327 F.2d 784, 55 LRRM 2441 (7 Cir. 1964). See also Raley's Inc., 143 NLRB 256, 258, 53 LRRM 1347 (1963).

Board's interpretations must stand unless they are "wholly baseless and completely without reason".[15] Similarly, this court has concluded that a railway award should not be disturbed unless the Board acted unconstitutionally or beyond its jurisdiction.[16]

Although we are quick to recognize that cases involving commercial arbitration disputes under the Federal Arbitraton Act[17] are not controlling authority,[18] an examination of standards applied by reviewng courts is invited. It has been held that a "mere error in the law or failure on the part of the arbitrators to understand or apply the law" will not justify judicial intervention,[19] and that the courts' function in confirming or vacating a commercial award is "severely

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[15] Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257, 261, 86 S.Ct. 368, 15 L.Ed. 308, 60 LRRM 2496 (1965).

[16] Barnett v. Pa.-Reading Seashore Lines, 245 F.2d 579, 582, 40 LRRM 2177 (3 Cir. 1956).

[17] 9 U.S.C.A. §1, et seq. Section 10 of the Act provides, inter alia, that the District Court may order the award vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made".

[18] We have previously held that the Federal Arbitration Act is inapplicable to appeals from labor arbitration awards due to the exclusion of "contracts of employment", §§1-4. Amalgamated Ass'n of Street, Elec., Ry., & Motor Coach Employees of America v. Pa. Greyhound Lines, Inc., 192 F.2d 310, 17 LA 372 (3 Cir. 1951). The analogy between the Federal Arbitration Act and the scope of review in labor cases was suggested but declined in Local 719, American Bakery and Confectionary Workers of America v. The National Biscuit Co., 378 F.2d 918, 65 LRRM 2482 (3 Cir. 1967). We choose here merely to pursue the analogy.

[19] Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2 Cir. 1967). See also San Martine Compania de Nav. v. Saguenay Term. Ltd., 293 F.2d 796, 801 (9 Cir. 1961).

limited".[20] If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated.[21]

The Supreme Court, in Wilko v. Swan, 346 U.S. 427, 436-37, 74 S. Ct. 182, 98 L. Ed. 168 (1953), suggested that an award should be vacated if it is in "manifest disregard of the law," and in Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 203, n. 4, 76 S. Ct. 273, 100 L. Ed. 199 (1955), the Court said: "whether the arbitrators misconstrued a contract is not open to judicial review."

Although federal and not state law is controlling in this case,[22] it is not inappropriate to examine those standards of reviewing arbitration awards which have been established by certain states. The Pennsylvania State Arbitration Act provides for a judicial review "[W]here the award is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict."[23] The New York

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[20] Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805 (2 Cir. 1960), cert. den. 363 U.S. 843 (1960). It will be noted that at the district court level in Amicizia, the test adopted was that the arbitrator's award should not be disturbed unless there was "a perverse misconstruction" of the law. 184 F. Supp. 116, 117 (S.D. N.Y. 1959).

[21] Ibid.

[22] Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957) held that "the substantive law to apply in suits under §301(a) is federal law, which the court must fashion from the policy of our national labor laws.

[23] Act of April 25, 1927, P.L. 381, No. 248, §11 (5 P.S. §171). Section 170(d) of the Pennsylvania Act provides, inter alia, that a court shall make an order vacating the award where the arbitrators have "exceeded their authority". See also N.J. Stat. Ann., tit. 2A: 24-8.

Court of Appeals has stated that so long as arbitrators do not reach an irrational result, they may "fashion the law to fit the facts before them" and their award will not be set aside because they erred in the determination or application of the law, Matter of Exercycle Corp., 9 N.Y. 2d 329, 215 N.Y.S. 2d 353, 174 N.E. 2d 463, 36 LA 998 (1961); Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 241 F. 2d 894 (2 Cir. 1961).

Under the common law the arbitrators are the final judges of both law and fact and their award will not be disturbed for a mistake of either. Freeman v. Ajax Foundry Prod., Inc., 398 Pa. 457, 159 A.2d 709 (1960).

Our reference to the area of commercial arbitration has been deliberate, even though we recognize that identical considerations do not apply to the labor field. To the extent that these cases reflect the judicial attitude toward the concept of arbitration, however, they are singularly important in determining the correct standard for the judicial review of labor awards. We are aware of the strong public policy of encouraging the peaceful settlement of industrial disputes by means of the device of arbitration. We are also aware of what has been called the "hostility evinced by courts toward arbitration of commercial agreement."[24]

Bearing this in mind and perceiving that the Supreme Court's announced standards in reviewing commercial awards call for the exercise of judicial restraint, we must

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[24] In Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 at 578, 46 LRRM 2416 (1960), the Court explained the different policy considerations applicable to commercial and labor arbitration cases: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

conclude that such a philosophy of restricted review compels even less judicial interference in matters arising from labor arbitration. At the very least this means that the interpretation of labor arbitrators must not be disturbed so long as they are not in "manifest disregard"[25] of the law, and that "whether the arbitrators misconstrued a contract" does not open[26] the award to judicial review.

Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.[27]

We now turn to the application of this standard to the case before us.

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[25] Wilko v. Swan, *supra*, 346 U.S. at 436.

[26] Bernhardt v. Polygraphic Co. of America, *supra*; 350 U.S. 198 at 203.

[27] We recognize that this is only one of several possible grounds for vacating an award deemed to be arbitrable. An award may be vacated where it is shown that there was fraud, partiality, or other misconduct on the part of the arbitrator (see e.g., Commonwealth Castings Corp. v. Continental Casualty Co., et al., — U.S. —, 37 L.W. 4037 (1968); San Carlo Opera Co. v. Conley, 72 F. Supp. 825 (D.C. N.Y. 1946), aff'd. 163 F.2d 310 (2 Cir. 1947)); or where the award violates a specific command of some law—usually the National Labor Relations Act (see e.g.,, Glendale Mfg. Co. v. Local No. 520, Int'l. Ladies Garment Workers Union, AFL-CIO, 283 F.2d 936, 45 LRRM 2985 (4 Cir. 1960)); or because the award is too vague and ambiguous for enforcement (see e.g., Hanford Atomic Metal Trades Council, AFL-CIO v. General Elec. Co., 353 F.2d 302, 61 LRRM 2004 (9 Cir. 1965)); 61 LRRM 2004; or because of inconsistency with public policy (see e.g., Black v. Cutter Laboratories, 43 Cal.2d 788, 793, 278 F.2d 905, 911, 35 LRRM 2391 (1953). But see Local 543 Int'l. Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25 (2 Cir. 1963, 52 LRRM 2543).)

II. Fletcher had been employed in various positions by the Ludwig Honold Manufacturing Company since 1948. On September 29, 1965, he was made a Sheet Metal Specialist A, the job having been posted and bid upon by him as provided in the collective bargaining agreement. The following day McGill was hired by the company and also made a Sheet Metal Specialist A. On November 16, 1965, the job of Sheet Metal Leader was posted and both Fletcher and McGill bid for it. The company gave the job to McGill on November 22, 1965.

Fletcher filed a grievance, contending that he was entitled to be awarded this job because of his seniority. Article XIX of the collective bargaining agreement between the company and the union provided: "Whenever Company determines that a permanent vacancy occurs or a new job is created, notice of such job shall be posted . . . employees with the greatest seniority shall be assigned to fill such jobs provided such employees have the skill and ability to perform the job involved in a satisfactory manner."

The company responded that Fletcher was ineligible for the reason that having been assigned to a new position on September 29, 1965, he could not apply for another one until he had served six (6) months in the prior job. To sustain its position the company relied on the following provision of Article XIX:[28]

> "Employees who have applied for such new jobs and have been assigned to fill such jobs will not be eligible to apply for any other posted job for a period of six

[28] The company also argued before the arbitrator that Fletcher could not be promoted because promotions can only be awarded within the family of job classifications within non-interchangeable groups. The jobs of Sheet Metal Specialist A and Sheet Metal Leader are in two different families of non-interchangeable jobs. We observe that if this argument is valid, it also could be advanced against the promotion of McGill.

(6) months from the date of his transfer into such a posted job, or by mutual agreement between Company and Union."

The grievance went to arbitration and the job was awarded to Fletcher.[29] The District Court vacated the award on the sole ground that Fletcher was ineligible for the position stating:

> "We are concerned, under the arbitrator's award, only with Fletcher's eligibility * * * We are concerned with the express language of the agreement, Fletcher's obvious ineligibility, and the arbitrator's award in violation of the express language of the agreement."

Our initial difficulty with this view is that if the language in the agreement is so inelastic as to make Fletcher ineligible, that same language would seem to disqualify McGill as well.

Prior to the November bidding for the job in issue, both applicants had been assigned to new jobs on successive days in September. The arbitrator concluded that neither applicant met the literal requirements of Article XIX which provided that "employees . . . will not be eligible to apply for any other posted job for a period of six (6) months from the date of his transfer into such a posted job . . ." The court below, however, confined its application of the in-

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[29] The collective bargaining agreement set forth the jurisdiction of the arbitrator:

> "The jurisdiction of the arbitrator shall be limited to a determination of the facts and the interpretation and application of the specific provisions of his agreement at issue. The arbitrator shall be bound by the provisions of this agreement, and shall have no authority to add to, eliminate, amend or modify any of its provisions."

eligibility requirements to Fletcher alone.[30] We can agree with the court's statement that the language of Article XIX, standing alone, is "unequivocal and unambiguous,"[31] but the language by its very terms applies equally to both Fletcher and McGill; and this was the conclusion reached by the arbitrator.

The arbitrator thus was confronted with two interpretations of the agreement: (1) the parties intended that where the only applicants for a position were technically inel-

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[30] Under the arbitrator's interpretation of Article XIX it is immaterial that McGill was hired as a new employee on September 30. He was hired for a position that had to be posted ("Whenever . . . a permanent vacancy occurs, or a new job is created, notice of such job shall be posted. . . ."); and the six-month no-transfer clause relating to ineligibility refers to both "employees who have applied for new jobs" and those who "have been assigned to fill such jobs". See Webster, Third New International Dictionary, Unabridged: "apply . . . to make an appeal or a request . . . [for example, (apply) to an employer for a job]".

Although the Company disagreed with the arbitrator's interpretation of the six-months' clause, it admitted that the promotion of McGill was inconsistent with that section of Article XIX relating to promotions between families of jobs. See footnote 28, *supra*.

[31] We do not agree, however, that the arbitrator is confined in his interpretation to the application of one specific contractual provision while excluding the remainder of the contract and all other relevant considerations. Under well-established canons of interpretation and construction, effect must be given to all parts of the instrument. Nor do we agree that the District Court was correct in isolating one phrase of the eligibility clause to reach its conclusion that the contract language was clear and unambiguous. In ascertaining whether language is clear and unambiguous the court must look to more than one detached section of the contract; it must consider: (1) the surrounding circumstances, prior negotiations, all relevant incidents bearing on the intent of the parties; (2) who prepared the instrument; (3) the relative bargaining position of the parties; (4) the doctrine of practical construction; and (5) the main purpose of the contract. Williston, Interpretation and Construction of Contracts, Ch. 22, §600A. See H. K. Porter Co., Inc. v. United Saw, File & Steel Prod. Wkrs., 333 F.2d 596, 56 LRRM 2534, (3 Cir. 1964) where we concluded that language which was ostensibly "clear and unambiguous" was qualified and contradicted by the past practices of the parties.

igible, the company would exercise a prerogative to make the appointment without regard to other provisions of the collective bargaining agreement; or, (2) the parties intended that where the only applicants were technically ineligible, promotions would be governed by other provisions of the agreement, namely, priority for the employees "with the greatest seniority . . . provided such employees have the skill to perform the job involved in a satisfactory manner."

A construction of the contract in the manner suggested by the first interpretation compels the conclusion that when the union entered into the agreement it intended to bargain away vital promotion rights; that the union intended to give management the privilege of avoiding the seniority and merit promotion provisions of the contract by the simple expedient of creating new positions during those six-month periods when none of its employees would be eligible to fill them. To so construe the agreement is to conclude that the parties intended to clothe the company with freedom to act unilaterally in the significant and sensitive area of job promotion.

The arbitrator did not so conclude. He found that it was the intention of the parties that both the company and the union would participate in the consideration of promotions under such circumstances by reference to other portions of the agreement.

We must now determine whether the collective bargaining agreement is capable of this interpretation. To pursue this inquiry it is necessary to examine first, the canons of contract construction and secondly, the "new common law —the common law of a particular industry or a particular plant."[32]

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[32] United Steelworkers of America v. Warrior and Gulf Navig. Co., 563 U.S. 574, 581, 46 LRRM 2416 (1960).

It is generally stated that the fundamental or paramount question in the legal construction of all contracts is a determination of the real intention of the parties. Williston, Interpretation and Construction of Contracts, Ch. 22, §601; 17A C.J.S. §295. A contract must be construed as a whole and wherever possible, effect will be given to all its parts. Williston, Ch. 22, §619; 17 A C.J.S. §297.[33] A construction which renders performance of the contract possible will be adopted, rather than one which renders its performance impossible or meaningless, unless the latter construction is absolutely necessary. 17A CJS §318.[34] Where ambiguity exists, the minor provisions must be construed as not to conflict with the main purpose of the contract. Williston, Ch. 22, §619.

In addition to these broad rules of general contract construction, a collective bargaining agreement must be viewed in the context of what the Supreme Court has characterized as "the industrial common law." In United Steelworkers v. Warrior & Gulf Navigation Co., *supra,* 363 U.S. at 581-82, 46 LRRM 2416, the Court stated it thusly: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."

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[33] See Restatement of Contract, §236(a): "An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect. (b) The principle apparent purpose of the parties is given great weight in determining the meaning to be given to manifestations of intention or to any part thereof."

[34] See, e.g., Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n., 218 F.2d 831 (10 Cir. 1955); Northern Pac. Ry. Co. v. United States, 70 F. Supp. 836 (D.C. Minn. 1946), aff'd. 188 F.2d 277 (8 Cir. 1951).

This court, speaking through Chief Judge Hastie, has recently said "We recognize that the enforcement of collective bargaining agreements, under Section 301(a) 'calls into being a new common law' . . . which in some aspects is fashioned 'from the policy of our national labor laws'." Nedd v. United Mine Workers of America, 400 F. 2d 103, 105, 68 LRRM 3012 (3 Cir. 1968).

The arbitrator could have reasonably concluded that the purpose of the prohibition against bidding for a new job within six months of entry into a prior one was to install some measure of job stability and that stability on job classification is a desire of management. It permits continuity in operations without unnecessary interruptions in plant processes; it minimizes interference with quality and quantity of production caused by constant shifting of personnel. Filling a new or vacant position with another employee of a lesser grade could conceivably cause a chain reaction of job shifting. Thus, filling a job in grade A from an employee in grade B creates a vacancy in B, to be filled by C, in turn creating a vacancy in C, and so on down the line. The six-months-in-grade requirement, fulfills still another desire of management: it develops special expertise from job experience which tends to increase productivity and to insure quality. High productivity and good quality, with resultant improvement in earnings, are certainly legitimate objectives of sound management.

The arbitrator could have concluded that the six-month provision was not inserted in the collective bargaining agreement at the insistence of the union representatives, for theirs is an objective separate and apart from that of management. They seek to obtain the highest wage commensurate with productivity, the best working conditions, and the maximum security for their membership. These, too are legitimate objectives.

The purpose of this provision, the function that it serves, and the reasons for its existence in the agreement—all bear on the basic canon of contract construction: a determination of the intention of the parties when they entered into the agreement.[35] And if the arbitrator found that this was a management-oriented provision, the extremely narrow issue then facing him was to decide the effect upon other provisions of the collective bargaining agreement in those instances when management consciously and deliberately waived its own provision in order to give the job to McGill.

The arbitrator could have reasoned that because both the union and management were insisting upon awarding the job to a person made technically ineligible by one provision of the agreement, in effect, both were waiving not only this one provision but all other provisions of the collective bargaining agreement as well. The subject matter thus being removed from the purview of any provisions of the agreement, it had to be considered as one reserved to management prerogatives exclusively and accordingly management was free to name McGill.

The arbitrator could have adopted another line of reasoning: that the act of departing from the terms of the agreement was initiated by the management only, in awarding the job in the first instance to McGill; that in so doing, management was waiving a management-oriented provision only, that from this unilateral action on the part of management the conclusion can neither be compelled nor reasonably inferred that the parties intended a mutual waiver—by both management and the union—of all other provisions of the agreement. Accordingly, although management had the

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[35] The policy or purpose of a statute is often the best guide to its true meaning. The same may be said of provisions in a collective bargaining agreement. Cox, Reflections Upon Labor Arbitrations, 70 Harv. L. Rev. 1482, 1504 (1959).

privilege of waiving the six-month requirement, all other provisions had to be given full force and effect.[36]

The first rationale set forth above was essentially that utilized by the District Court in vacating the award; the second rationale could have been attributed to the arbitrator. It is not within the province of a reviewing court to agree or to disagree with the conclusion reached or with the specific reasoning employed. Our sole function is to decide whether the arbitrator's interpretation met the test which the courts must apply in exercising the limited function of review in cases arising from labor arbitration.

The arbitrator's award in the case at bar can indeed be drawn from what the Supreme Court in Enterprise described as the labor arbitrator's source of law: the express provisions of the contract and the tenets of industrial common law. It can be justified on the grounds that he construed the agreement as a whole, that he gave it a construction rendering performance of the contract possible rather than one which rendered its performance impossible or meaningless, and that his interpretation gave a reasonable and effective meaning to the manifestations of intention of the parties considered against the backdrop of practices of industry and the shop.

We cannot say that his award flies in the face of any rational interpretation of the collective bargaining agreement, viewed in the light of the criteria we have discussed heretofore in detail. Accordingly, we hold that judicial interference with the arbitrator's award was not proper.

The judgment of the District Court will be reversed and an appropriate judgment entered in favor of the appellants.

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[36] There is no surer way to find out what the parties intended than to examine what they have done. Williston, *supra*, Ch. 22, §623; Atlas Trading Corp. v. Grossman, 169 F.2d 240 (3 Cir. 1948). Where the actions of labor and management suggest an interpretation that qualifies the written language of the basic document it is incumbent upon the arbitrator to give credence to such acts. When the company awarded the position to McGill, despite its admission that he, too, was ineligible, it indicated quite clearly that reasonable flexibility was intended.

UPREME COURT, U. S.

APR 28 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1968

No. 1091

LOCAL 342, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), VAN E. WARREN, MARK BROCKETTE, GAIL M. TRIBBLE, LEWIS C. STONE, SHIRLEY L. JUDKINS, DELBERT STORIE, AND PERRY CARLTON,
Petitioners,

v.

TRW, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Where a labor arbitrator adds terms to a negotiated contract based on his own personal beliefs as to "fairness" and bases his award on the added terms, does a court act improperly in denying enforcement to the arbitrator's award?

STATEMENT OF THE CASE

Facts

On July 8, 1964, a two-day wildcat strike commenced at the Respondent Company's plant in Lebanon, Tennessee.[1] All seven of the individual petitioners in the instant case took part in the strike. At 10:15 a.m. on the second day of the strike, the Company sent each of the seven individual petitioners the following notice of discharge by telegram:

> "Because of your participation in an action in violation of Section I, Article 10 of the Company-Union Agreement dated February 15, 1963, you are discharged."

A copy of this same telegram was furnished petitioner Union. Striking employees began returning to work one hour and fifteen minutes after the notices of discharges were sent. (3a)[2]

A collective bargaining agreement was in effect between the Company and the Union at the time of the above events. Article X, Section 1 of the agreement provides in relevant part:

> "During the term of this Agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike * * *. The parties recognize the right of the Company to take disciplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants * * *. (6a)

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[1] More than 200 employees were involved in the strike. A substantial number of employees, however, stayed on their jobs and did not participate in the strike. (3a)

[2] Unless otherwise indicated, all page references herein are to the Appendix to the Petition for a Writ of Certiorari.

Article IV of the agreement contains a grievance procedure culminating in arbitration. The arbitration provision provides in relevant part:

> "* * * The Arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto. * * * The Arbitrator shall be bound by the provisions of this Agreement. * * *" (5a)

The Union processed grievances over the discharges of the seven striking employees through the grievance procedure and to arbitration. (2a)

The Award of The Arbitrator
(1a-16a)

The arbitrator found that each of the seven grievants (individual petitioners in this case) participated in a strike in violation of Article X, Section 1 of the agreement, and that each was informed by telegram that he was being discharged for such participation. (3a) The arbitrator further found that under Article X, Section 1 of the agreement, the Company had the right to impose selective discipline, including discharge, upon employees who were guilty of "participating" in a violation of that section, and that the disciplinary action taken by the Company need not be imposed upon all employees who were equally guilty of participating in a violation of the section. (10a-11a)

In spite of his findings that the seven grievants had participated in a strike in violation of the agreement and that the Company had the right to impose discipline, including discharge, because of such participation, the arbitrator held that the Company was only entitled to discharge those employees who had "actively encouraged other employees to participate in the strike." (13a) The arbitrator found that two of the grievants[3] were not guilty of actively encourag-

[3] Van E. Warren and Mark Brockette.

ing other employees to strike, and, in spite of their admitted participation in the strike, ordered the Company to reinstate them with back pay. (14a, 1a)

The arbitrator found that the remaining five grievants[4] were guilty of actively encouraging other employees to participate in the strike, and that they were "deserving of discipline." (13a) In spite of this finding, however, the arbitrator ordered the five grievants reinstated in their jobs based solely on the arbitrator's personal and subjective belief that "the procedure followed by the Company was lacking in fundamental fairness." (15a) The "procedural unfairness," according to the arbitrator, consisted of the Company's failure to inform the grievants of the charges against them, and the lack of objective investigation by the Company. (15a-16a)

When the Company refused to comply with the arbitrator's award, the Union and the individual grievants filed the instant action for enforcement of the award in the United States District Court for the Middle District of Tennessee.

The Decision of The District Court

(17a-25a)

The District Court held that the requirements of "active encouragement of others to strike" and "procedural unfairness" invoked by the arbitrator did not appear explicitly in the collective bargaining agreement. (21a) The court, nevertheless, upheld the arbitrator's award concluding that these two requirements were "a fair and logical inference from the agreement." (22a)

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[4] Gail M. Tribble, Lewis C. Stone, Shirley L. Judkins, Delbert Storie, Perry Carlton.

The Decision of The Court of Appeals (26a-35a)

The Court of Appeals for the Sixth Circuit denied enforcement of the arbitrator's award on the authority of *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

The court held that the conduct of the arbitrator "constituted the addition of terms to a negotiated contracts . . ." (31a) There was no requirement in the contract limiting the Company's right to discharge participants in a strike to those participants who actively encouraged others to strike. (32a) Neither was there a requirement in the contract of prior notice or bilateral investigation. (31a-32a) The court found that the arbitrator added those requirements to the contract based "upon his assumption that it was within his province to determine whether the company's exercise of its own contractual rights comported with his own notion of 'fundamental fairness.'" (29a) The court noted that the contract expressly provided:

> "The arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto." (32a)

The court stated its conclusion in the following language:

> "*Enterprise* announces the rule controlling this case.
>
> 'Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.' 363 U.S. at 597.

Obeying that rule, we decide that the order of the arbitrator should have been denied enforcement." (35a)

ARGUMENT

I. Where a labor arbitrator adds terms to a negotiated contract based on his own personal beliefs as to "fairness" and bases his award on the added terms, this Court's decision in Enterprise requires that enforcement of the arbitrator's award be denied.

The controlling authority for this case is the decision of this Court in *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). In *Enterprise* this Court reversed a court of appeals that had denied enforcement of an arbitrator's award because it did not agree with the arbitrator's interpretation of the collective bargaining agreement. This Court said:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his." 363 U.S. at 599.

This Court also stated in *Enterprise:*

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597.

Thus, two basic points were established by this Court in *Enterprise*. First, the question of interpretation of an agreement is for the arbitrator, and a court may not deny enforcement of his award because the court's interpretation of the agreement is different than his. Second—and equally important—this Court held that an arbitrator is *confined* to interpretation of the agreement. If the arbitrator does not confine himself to interpretation of the agreement, but instead proceeds "to dispense his own brand of industrial justice," then a court is obligated to deny enforcement of the award.

The proper application of the *Enterprise* test requires judicial examination of the arbitrator's award and judicial examination of the collective bargaining agreement. A determination as to whether the arbitrator has confined himself to interpretation of the agreement cannot be accomplished with less.

The court below in the instant case examined both the arbitrator's award and the collective bargaining agreement, as required by *Enterprise*. On the basis of its examination, the court below found that the arbitrator's award demonstrated that the arbitrator had not confined himself to interpretation of the agreement, but instead had added terms to the agreement based on his own personal beliefs as to fairness. Since an arbitrator is not permitted "to dispense his own brand of industrial justice," the court below —in compliance with *Enterprise*—denied enforcement of the arbitrator's award.

The court below found that the arbitrator had added terms to the agreement in two respects.

A. The "active encouragement of others to strike" addition.

Article X, Section 1 of the agreement provides in relevant part:

> "During the term of this Agreement the Union and its members, individually and collectively, will not permit, cause, or take part in any strike * * *. The parties recognize the right of the Company to take disciplinary action, including discharge, against any employees who participate in a violation of this Section, whether such action is taken against all of the participants or against only selected participants * * *. (6a)

The arbitrator found that each of the seven grievants participated in a strike in violation of this section and that each was informed he was being discharged for such participation. (3a) The arbitrator further found that under this section the Company had the right to impose selective discipline, including discharge, upon employees who were guilty of participating in a violation of the section and that the disciplinary action taken by the Company need not be imposed upon all employees who were equally guilty. (10a-11a) In spite of these findings, the arbitrator ruled that the Company was only entitled to discharge those employees who had "actively encouraged others to participate in the strike." (13a)[5] By so ruling, the arbitrator exceeded his contractual authority. The standard by which the arbitrator measured the Company's right to discharge the grievants was whether or not the grievants had actively encouraged others to strike. The standard set forth in the collective bargaining agreement, however, is *participation* in the prohibited strike. By basing his award on a non-contractual standard, the arbitrator was making an addition to the terms of the agreement which he was prohibited from doing not only by *Enterprise* but by the express terms of the agreement. Article IV of the agreement provides:

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[5] The arbitrator found that two of the grievants were not guilty of actively encouraging others to strike and ordered their reinstatement with back pay. (14a, 1a)

> "The Arbitrator shall not have the power to add to or subtract from or modify any of the terms of this Agreement or any agreement supplemental hereto."

The court below held that the "active encouragement of others to strike" requirement imposed by the arbitrator was non-contractual and constituted the addition of a term to the collective bargaining agreement. The court below stated:

> "It was [the arbitrator's] view that, notwithstanding that all seven appellees had engaged in the illegal strike, giving the company the right to discharge them, the company had a burden of proving to him that each of the grievants was in fact a leader in encouraging the illegal walkout.
>
> • • •
>
> The conduct which brought into being the company's right to discharge any employee was 'participation in an action in violation of Section 1, Article 10, of the company-union agreement.' All seven appellees were admittedly guilty of such a violation and were thereby subject to discharge without reference to whether they were or were not activists in promoting or encouraging others to join in an illegal strike. It was not for an arbitrator to add to the contract a provision that the above right to discharge would be lost unless the company had, in the turmoil and crisis of a strike, announced the reasons for the selectivity employed in exercising its rights and later had established that such reasons were, in the view of an arbitrator, sufficient to permit it to exercise the selectivity which was also an unqualified contractual right." (29a, 32a)

B. The "procedural unfairness" addition.

Although finding that five of the grievants were guilty of actively encouraging others to strike, the arbitrator ordered them reinstated based solely on his personal beliefs as to "procedural unfairness." As stated by the arbitrator:

> "The Arbitrator believes that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case. In the absence of compelling circumstances it is not ordinarily proper to discharge an employee without informing him of the charges against him and without affording some opportunity for objective investigation." (15a-16a)

Thus, the "procedural unfairness," according to the arbitrator, consisted of the Company's failure to inform the grievants of the charges against them, and the lack of objective investigation by the Company.

The court below held—and properly—that the arbitrator's use of the "procedural unfairness" requirement "constituted the addition of terms to a negotiated contract." (31a) The court below found that the agreement did not contain any requirement of prior notice[6] or objective investigation. (31a-32a) The court below found that the award was based upon the arbitrator's "assumption that it was within his province to determine whether the company's exercise of its own contractual rights comported with his own notion of 'fundamental fairness.' " (29a)

Petitioner argues that the arbitrator's standard of "procedural unfairness" is the result of his interpretation of the five-step grievance procedure provisions of the agreement. (Petition, p. 5.) This is an example of wishful brief writing. Petitioner may wish that the arbitrator had so reasoned, but he did not. Nowhere does the arbitrator state that the five-step grievance procedure contains—or is interpreted by him to contain—the requirement of prior notice or objective investigation.

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[6] As noted by the court below, even if prior notice were a contractual requirement, the undisputed evidence as found by the arbitrator shows that each of the grievant's was in fact told of the charge against him and the reason for his discharge. (32a)

What the arbitrator does state is that:

> "The Arbitrator *believes* that a discharge can be improper because of procedural unfairness and it is his opinion that this is true in the present case." (Emphasis added.) (15a)

The arbitrator does not even purport to base the imposition of his "procedural unfairness" requirement on anything other than his own personal and subjective beliefs.

An arbitrator is not permitted "to dispense his own brand of industrial justice" based on his own personal beliefs. He is confined to interpretation of the particular collective bargaining agreement negotiated by the parties. That agreement contains no requirements of prior notice or objective investigation.

There is an even more basic reason, however, why Petitioner's argument must fail. At the outset of his opinion, the arbitrator makes the following statement:

> "*It was stipulated* that the entire case was properly before the Arbitrator for decision in accordance with the terms of the Collective Agreement and *that all preliminary procedures had been carried out as specified in the Collective Agreement.*" (Emphasis added. (2a)

The issue as to procedural fairness or unfairness was not submitted to the arbitrator for his determination. This issue was specifically excluded from the arbitrator's consideration by stipulation of the parties. It was stipulated that "*all* preliminary procedures had been carried out as specified in the Collective Agreement." (Emphasis added.) Thus, the "procedural unfairness" requirement imposed by the arbitrator could not properly have been an interpretation of the contractual procedures contained in the agreement because all issues as to these procedures were excluded from the arbitrator's consideration.

Further support—if any is needed—for this point is demonstrated by the fact that in quoting the relevant con-

tract provisions to be interpreted by him, the arbitrator omitted the five-step grievance procedure. (5a) This omission represents acknowledgment by the arbitrator that the procedures preliminary to arbitration were not before him for consideration or interpretation.

Contrary to Petitioner's assertion in its Petition to this Court, the court below did not substitute its interpretation of the agreement for the arbitrator's, in violation of *Enterprise*. The court below examined the arbitrator's award and the collective bargaining agreement—as required by *Enterprise*—and found that the arbitrator had not confined himself to interpretation of the agreement, but instead had added terms to the agreement based on his own personal beliefs as to fairness. By adopting two non-contractual standards—active encouragement of others to strike and prescribed procedures for discharge—as his criteria for deciding the grievances, the arbitrator manifested an infidelity to his obligation to confine himself to interpretation of the agreement. The arbitrator violated the test set by this Court, for he was dispensing "his own brand of industrial justice." The court below, in compliance with *Enterprise*, properly denied enforcement to his award.

The courts of appeals for the Second Circuit and the Fourth Circuit have applied the same rationale as the court below in holding that where an arbitrator does not confine himself to interpretation of the agreement but instead adds terms to the agreement, *Enterprise* requires that enforcement be denied of the arbitrator's award. *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F.2d 677, 681-82 (2d Cir. 1966); *Textile Workers Union of America v. American Thread Co.*, 291 F.2d 894, 900 (4th Cir. 1961); *International Union of Electrical Workers Local 791 v. Magnavox Co.*, 286 F.2d 465, 467 (6th Cir. 1961).

In its Petition, Petitioner asserts that the courts of appeals for the Seventh Circuit and the Eighth Circuit have

rejected the adding-terms-to-the-agreement test employed by the Second, Fourth and Sixth Circuits, citing as authority for this assertion *Western Iowa Pork Co. v. Packinghouse Workers Local 52,* 366 F.2d 275, 278 (8th Cir. 1966) and *Oil, Chemical & Atomic Workers Local 7-644 v. Mobil Oil Co.,* 350 F.2d 708, 711 (7th Cir. 1965). (Petition, p. 19.)

Neither of these cases supports the proposition asserted by Petitioner. In both cases the company contended that the arbitrator's award added terms to the agreement and that enforcement should be denied. The court in both cases rejected the company's contention, finding instead that the arbitrator had confined himself to interpretation of the agreement. The company's added-terms contention was rejected not because it was an incorrect statement of the law, but because a comparison of the award with the agreement demonstrated that the arbitrator had not, in fact, added terms to the agreement. An analysis of the two cases shows that the Seventh Circuit and the Eighth Circuit considered the added-terms test to be a proper ground for denying enforcement of an arbitrator's award, even though ultimately finding under the particular facts of each case that the record did not support the company's contention that the arbitrator added terms to the agreement.

II. The decision of the court below is not in conflict with the Third Circuit's decision in Ludwig Honold Mfg. Co.

Petitioner requests that this Court grant *certiorari* based on its assertion that the decision of the court below is in conflict with the decision of the Court of Appeals for the Third Circuit in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123 (3d Cir. 1969). (Petition, pp. 13-15.) There is no conflict between the two decisions.

In *Honold,* the arbitrator was faced with two conflicting clauses in the agreement. One clause provided that perma-

nent job vacancies were to be posted for bidding and that employees with the greatest seniority would be assigned to fill such jobs. Another clause provided that employees newly assigned to a job would not be eligible for another job for six months. A contest for a new job developed between two employees, each of whom had been assigned to his present job within the preceding six months. The company assigned the job to the employee who had less seniority. The arbitrator upset the company's assignment and awarded the job to the employee with the greater seniority. The arbitrator reasoned that where the only applicants for the job were technically ineligible under the six-month clause, the promotion should be governed by the clause giving priority to the employee with the greatest seniority. The Third Circuit held that the arbitrator's award was based on his interpretation of express provisions contained in the agreement, and that in light of *Enterprise,* judicial interference with his award was not proper.

The decision of the Third Circuit in *Honold* and the decision of the court below in the instant case are not in conflict. Both courts relied on and applied the *Enterprise* test: If the arbitrator confines himself to interpretation and application of the collective bargaining agreement, his award will be enforced; if, on the other hand, the arbitrator does not confine himself to interpretation of the agreement but instead dispenses his own brand of industrial justice, his award will be denied enforcement. The Third Circuit in *Honold* found that the arbitrator had confined himself to interpretation of the agreement. The court below found that the arbitrator in the instant case had not. Both courts applied the same legal principle but a different result was reached by each because of different facts. This does not create a conflict between the two circuits.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 28, 1969.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1091

LOCAL 342, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), VAN E. WARREN, MARK BROCKETTE, GAIL M. TRIBBLE, LEWIS C. STONE, SHIRLEY J. JUDKINS, DELBERT STORIE, AND PERRY CARLTON,
Petitioners,
v.
TRW, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

(Unless otherwise indicated, page references are to the Petition for Certiorari. Those which include the letter "a" are to the Appendix part of the Petition.)

The court below ruled that the collective bargaining agreement was so clear and unambiguous as *not to allow of interpretation*, and refused to enforce the arbitrator's

decision on the ground that *it was based on an interpretation.* The court said:

> "We consider that the company's contract with the union, of which all the individuals were members, gave it a clear right to do what it did. The language of this contract was not ambiguous, nor did any of its terms require interpretation by the arbitrator or the courts." (p. 30a).

This case, therefore, stands for the proposition that there are arbitration decisions which are based on the arbitrator's interpretation of the contract which are nevertheless not entitled to enforcement—those in which the meaning of the contract is so clear to the court as not to permit of interpretation. The decision is thus in square conflict with the basic principle of the law of labor arbitration this Court fashioned in the Steelworker Trilogy[1]—that the courts are not to redecide the merits of arbitration decisions. As the court articulated this principle in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration of collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

Unless reversed, this decision will stand as a guide to courts on how to refuse to enforce arbitration awards with which they disagree—by simply declaring the contract so clear as not to allow of interpretation, and denying enforcement on the ground that the award is based on an interpretation.

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[1] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Steelworkers v. Enterprise Corp.*, 363 U.S. 593.

In its Brief in Opposition, the Company contends that the court below denied enforcement on the ground that the arbitrator's decision was based on terms he added to the contract.[2] It is true, as we noted in the Petition (pp. 8-9, 18-19), that after striking down the arbitrator's decision on the ground that the contract was clear and not subject to interpretation, the court below stated that the arbitrator's conduct "constituted the addition of terms to a negotiated contract which was neither unclear nor incomplete" (p. 31a). This, however, was but a transparent effort to bring the court's decision within *Enterprise*.[3] It

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[2] The first "addition" the Company complains of—"active encouragement of others to strike"—was a standard of selective discipline adopted by the *Company*, not the arbitrator, as both the arbitrator and the district court carefully noted (pp. 11a, 22a). The second—"procedural unfairness"—was used by the arbitrator in discussing the Company's failure to disclose the real ground for the employees' discharge until the arbitration hearing. The standard was a valid inference from the contract (see p. 18, n. 6). But, in any event, the arbitrator went on to rule the Company's conduct in violation of the *grievance procedure provisions* of the contract, in the following words:

> "In any event, for the Company to withhold the real basis for discharge while a grievance is being processed results in preventing the grievance machinery from carrying out its intended function." (p. 16a).

[3] Betraying its concern over the grounds relied upon by the court below in denying enforcement, the Company, at page 11 of its brief, seeks to substitute one not mentioned by the court and raised for the first time here—that in ruling that the Company violated the grievance procedure, the arbitrator decided an issue not submitted to him, since at the arbitration hearing the parties stipulated "that all preliminary procedures had been carried out" (p. 2a). However, this Court's decision as to whether to review a lower court's opinion is based not on the grounds the lower court *might* have employed, but on the ones it *did*. Cf. *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943). Moreover, the substitute ground now offered by the Company is baseless. The Union could not have waived, in a stipulation entered into at the beginning of the arbitration hearing, conduct of which it became aware only later in the hearing—the Company's withholding of the real basis for discharge.

is perfectly apparent that what the court did was (1) interpret the contract for itself; (2) compare the arbitrator's interpretation with its own; and (3) conclude that the arbitrator must have added terms to the contract, since his interpretation included some not found in its own (see pp. 8-9).

As the arbitrator and the district court made clear, the arbitrator based his decision on his interpretations of the selective discharge and grievance procedure provisions of the contract, including terms which he found were implied by those two provisions (p. 18 n. 6). Because the court did not agree with the arbitrator's interpretations it was not free to get rid of them by simply calling them new terms he had added to the contract. Even if it is assumed that the arbitrator's interpretations are wrong, they are nevertheless interpretations, not added terms, and are entitled to enforcement; for as the Court stressed in *Enterprise*, "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different than his." 363 U.S. at 599.

Of course, an arbitrator cannot simply write brand new terms into a contract, i.e., terms which are absolutely unrelated in any way to any of the contract's express provisions. But where an arbitrator, in studying the provisions of the contract, finds that they imply terms not expressly set forth, he is not adding terms to the contract but interpreting it. See, e.g., *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-83; *Rubber Workers Local 135 v. Dunlop Tire Co.*, 391 F.2d 897, 899 (2d Cir. 1968). That is what the arbitrator did in this case, and it is what the court below said "constituted the addition of terms to a negotiated contract".

This decision, therefore, teaches two methods by which courts can circumvent *Enterprise* and redecide the merits

of arbitration decisions with which they disagree. (1) Declare the contract to be so clear as not to allow of interpretation, and strike down the arbitrator's decision as based on an interpretation. (2) Compare the arbitrator's interpretation with the court's and call any terms not included in the court's (especially implied ones) terms the arbitrator has added to the contract.

If arbitration cases are to be finally decided by the arbitrators and not the courts, as our federal labor policy requires, *Enterprise*, 363 U.S. at 596, this case must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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